MURPHY *vs.* HUBERT.

SUPREME COURT OF PENNSYLVANIA.

REVIEW

OF THE

OPINION OF THE COURT,

THAT

THE ACT OF MARCH 21, 1772,

ENTITLED

"AN ACT FOR PREVENTION OF FRAUDS AND PERJURIES,"

DOES NOT APPLY TO

TRUSTS OR EQUITABLE ESTATES.

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PREFACE.

The following remarks upon the case of Murphy *v.* Hubert, decided by the Supreme Court of Pennsylvania, December 1847, are made with entire respect for the Chief Justice, and all the Judges of the Court who concurred in that judgment. The writer had no professional connexion with the case, nor with the counsel who argued it. Its existence was unknown to him, until he saw in manuscript the opinion of the Chief Justice, a few days after it was delivered; when it struck him, as it continues to do, as a misinterpretation of the Act for Prevention of Frauds and Perjuries. Upon mature consideration he became satisfied, that both the judgment and the reasons for it, deserve reconsideration by the Court; and that on failure of that, the public interest requires a new enactment by the Legislature, to prevent the perpetration of fraud and perjury by parol declarations of trusts. The members of the Bar in Pennsylvania, who may be presumed to take an interest in the question, as one of extensive though local concern, will judge whether the remarks of the writer are just.

Philadelphia, October 1848.

MURPHY *v.* HUBERT.

SUPREME COURT OF PENNSYLVANIA.

7 Barr, 420.

Until the case of *Murphy* v. *Hubert* at December Term, 1847, seventy-five years after the Act of Frauds of 21st March, 1772, it was never decided by the Supreme Court of Pennsylvania, that the Act does not apply to trusts or equitable estates and interests in land, as much as to legal estates and interests. The general action of all the courts has implied that it extends to and includes both equally. In several instances judgments of the Supreme Court have been delivered in terms which expressly assert its comprehension of both. A decision to the contrary in the case above referred to, must therefore be regarded as materially affecting the stability of the law, and as pregnant with important consequences to this particular branch of it.

The enactments of the Pennsylvania Act of Frauds, as well as those of the English Statute of Frauds, 29 Car. 2, c. 3, some of whose provisions the Pennsylvania Act adopts, will be fully adverted to hereafter; but at present it is proper to state, that the point in controversy is whether a trust or equitable estate in lands is comprehended by the words "all leases, estates, interests of freehold or term of years, or any uncertain interest, *of, in, or out of any messuages, manors, lands, tenements, or hereditaments;*" for these are the words of the first section of the Act of 21st March, 1772.

Chief Justice Gibson, it is true, has in two instances used language remarkably strong, to convey his opinion that the law was previously settled, as it is held in *Murphy* v. *Hubert.*

In *Randall* v. *Silverthorn*, 4 Barr, 177, his language was as follows: "It is settled by *German* v. *Gabbald*, 3 Binn. 302, *Wallace* v. *Duffield*, 2 Ser. & R. 521, *Peebles* v. *Reading*, 8 Ser. & R. 492, and *Slaymaker* v. *St. John*, 5 Watts, 27, that a trust is not within our Statute of Frauds,—a train of authorities that would be nearly enough to overrule the statute, did it conflict with them." And the Chief Justice uses equivalent language in *Dyer* v. *Cornell*, 4 Barr, 359, adding to the four cases he again cites, the case of *Martin* v. *M'Cord*, 5 Watts, 493, as particularly ruling the same principle.

But it is not difficult to show that no one of these cases warrants his conclusion.

German v. *Gabbald* was a case of the investment of trust moneys in the land, and was ruled expressly upon the ground that the trust was raised by operation of law from the investment proved by parol, for which *Gregory's Lessee* v. *Setter*, 1 Dall. 193, was held to be an authority in point. And the language of Chief Justice Tilghman upon the Act of 1772, in noticing the argument of the defendant's counsel who claimed under the trust, is plainly hypothetical. "Now *if our Act does not comprehend the case of trusts*, there is an end of the question, because there will be nothing to prevent parol proof of anything by which a trust may be inferred. But supposing it to be as comprehensive as the English statute, still parol evidence may be given to establish a trust which arises by implication of law." This case, therefore, whatever may be its authority, did not settle the point, that trust estates are not within the Act of 1772.

Wallace v. *Duffield* was decided upon the authority of *German* v. *Gabbald*, as also a trust arising or resulting by construction of law. It was an investment of trust moneys by executors in the purchase of lands; and it is clear, from Judge Gibson's opinion in that case, that he was not inclined to establish it as a trust, because other money of the executors had contributed to the purchase; and he expressed his opinion that *Gregory's Lessee* v. *Setter*, and *German* v. *Gabbald*, had carried the doctrine of resulting trusts quite far enough. But if the Act of 1772 did not repudiate the evidence, the trust was established by the parol declaration of the purchaser that a trust was intended, and whether it was strictly a resulting trust or an original trust was of no importance, if the Act did not include trusts.

Peebles v. *Reading* certainly assumes that a trust is not within the Act, but it neither settles it nor decides it. Judge Duncan in his opinion does no doubt argue against the extension of the Act to trusts, upon the ground that it does not contain certain sections of the English statute; but the Judge of the Common Pleas had entertained the same opinion, and the Supreme Court reversed his judgment, because, even if the parol proof was sufficient to establish the trust, the *cestuy que trust* by his laches had lost his title to relief. And this only is the point of the judgment, and is the limit of its authority.

So far was Judge Duncan from thinking that *Peebles* v. *Reading* had settled the construction that the Act of 1772 does not extend to trusts, that in *Withers' Appeal*, 14 Ser. & R. 193, he delivered the judgment of the court to the contrary, the unanimous judgment of the court, of which Judge Gibson was a member. Judge Duncan says, "If this claim can be supported, it must be because a trust was created, for no legal estate passed; and if such a trust were to prevail, it would be repealing the Act of Frauds and Perjuries,

which enacts that no estate or interest in land shall be created by parol only, and no trust can be raised by mere words, unless where it is raised by act and operation of law. A departure from the wholesome provisions of the clear and positive enactments of that Act, of which it has been said by English jurists, that every line of it deserved a subsidy, has been regretted; and judges instead of extending the exceptions, are drawing in and conforming to the statute. It must be conceded that at law no interest in the land passed to John Withers. Although the seventh section of the Statute of Frauds, which enacts that all declarations or creations of trusts or confidences of any lands, &c., shall be manifested and proved by some writing, is not incorporated in our law, yet in substance it is comprehended in the first section of the Act: no interest in land either in law or equity shall pass by parol only, any agreement to the contrary notwithstanding, except for a term not exceeding three years, nor except by deed or note in writing signed by the party, or by the act and operation of law. Trusts arising by act and operation of law, are where trust money has been laid out in lands, or where one man pays the money, and the conveyance is to another. These and cases within the same reason, are the only cases of resulting trusts by act and operation of law which are within the exception in the act of Assembly. *Wallace* v. *Duffield*, 2 Ser. & R. 521. To raise a trust by act and operation of law, an actual payment by cestui que trust must be shown to have been made at the time of the purchase. *Stiner* v. *Stiner*, 5 Johns. Chan. Rep. 1. Cases of fraud are always exceptions between the parties to the fraud."

These are not *dicta*, nor are they delivered *obiter*. They are the very ground of the judgment. Nothing is subsequently said in Judge Duncan's opinion, to show that the affirmance of the judgment was placed upon any other ground, more than upon this, that the Act did embrace all interests in land, whether equitable or legal, excepting the classes of trusts referred to in the last clauses of the extract. His reasons for the conclusion may not be altogether satisfactory; but the conclusion is plain, and is thought to be defensible, upon grounds hereafter to be stated. The extract is given to show that the authority of *Peebles* v. *Reading* is of no force upon the point for which Chief Justice Gibson cites it, either by what it decides, or by the personal opinion of Judge Duncan, who afterwards deliberately expressed a contrary opinion.

Slaymaker v. *St. John* was the case of a resulting trust, by the payment of purchase money by one, and the taking of the deed in the name of another. Sergeant J., who delivered the Court's opinion, put the case expressly and narrowly upon that ground, and said that it was ruled by *German* v. *Gabbald;* and he does not in any part of his opinion suggest that a trust generally is not within the Act of 1772.

Martin v. *M'Cord* was the case of a charitable use, the land

being contributed by one, and the building by others, for the purposes of a school for the neighbourhood. Judge SERGEANT again delivered judgment, and put the case upon the ground that it was "a purchase for valuable consideration, accompanied with possession, and the making of valuable improvements under the eye of the owner, and by his assent and direction. Such a case," he says, "is clearly unaffected by the statute, and passes a good title to the persons subscribing, and building the house. If it were otherwise, it would enable those claiming under the donor to commit a fraud, and regain the property with the improvements made by others under his agreement." The doctrine of the learned Judge and of the whole court is precisely the same that prevails in England in the same state of facts; and therefore the judgment settles nothing like the point that a trust is not within our Act of Frauds. Such a trust is neither within our Act, nor within the Statute of 29 Car. 2, c. 3. It is a trust *mala fide*, for that is the ground on which all cases of parol gifts and agreements, with part performance, are enforced in England, and may equally well be enforced in Pennsylvania, however clearly the Act of 1772 may extend to trusts. They are out of both statutes, "not so much on the principle of no danger of perjury, as that the statute was not intended to create or protect fraud." 2 *Sugd. on Vendors*, 198, 10th ed.

None of these cases then can be said to settle the point, that a trust is not within the Act of 1772; and only one of them contains a *dictum* to that effect, which was afterwards renounced by the learned Judge from whom it fell. All the other cases, as well as many more that might be cited, imply the clear contrary, by treating the case before the Court as an exceptional resulting trust, or a trust *mala fide*. It is only by taking the peculiar view of Chief Justice GIBSON, hereafter to be noticed, (that if trusts are within the Act of 1772, resulting trusts are not an exception, and cannot be proved by parol, and therefore that in receiving parol proof of a resulting trust, the court decided in every such case, that trusts generally are not within the Act,) that we can understand his reference to these cases as settling such a point. But Chief Justice GIBSON's views will be more particularly adverted to in another place.

In *Kisler* v. *Kisler*, 2 Watts, 323, a distinction was taken, which shows how far the point stated by the Chief Justice was from being settled in 1834, after all the cases referred to by him, except *Martin* v. *M'Cord*.

Kisler v. *Kisler* was the case of a purchase of land at sheriff's sale by a guardian, who had been requested by his ward to purchase it for him, and the guardian, at the time of making the purchase, declared that it was made for the ward, and not for himself, to which the ward assented, and procured security for the guardian to perform the conditions of sale. After the purchase a new guardian was appointed in place of the first, who offered the land to the

new guardian for his ward, on the same terms on which he had bought it. The second guardian declined taking it, and the first guardian sold it before the ward was of age, for two thousand dollars more than he gave. The first guardian had paid one hundred dollars on account, on the day of the purchase; and this sum the ward tendered before the re-sale, and offered to take the land, and tendered security for performing the conditions of sale. But the first guardian refused to let the ward have the land. The action was an action on the case to recover from the administrator of the first guardian, the two thousand dollars, and the jury found a special verdict, with two thousand dollars damages to the plaintiff, if the Court should think he was entitled to recover; and on this verdict the Common Pleas entered judgment for the defendant, which the Supreme Court affirmed upon Error.

The arguments of counsel are not given, and in the opinion of Chief Justice Gibson, no reference is had to the case in the aspect of a parol agreement to sell and convey, for which damages might be recovered according to *Ewing* v. *Tees*, 1 Binn. 450, but it was regarded solely as a case of trust or no trust; and it is for the distinctions of the Chief Justice on this head that the case is referred to.

"That an express trust may be declared by parol," the Chief Justice said, "I am not disposed to deny; but if declared by the grantee and not the grantor of the legal estate, where its object is not to indicate a beneficiary purpose by the grantor in favour of the *cestui que trust*, it must, to be binding, be made in consideration of the payment of the purchase money by the cestui que trust; and then it would produce no other effect than the law would produce without it.* Probably it was the object of the statute to sustain a gift of land by the grantor to a person not named in the conveyance, but not a gift by the party purchasing, the execution of which could not be enforced for want of consideration."—"Of what importance, then, is the omission in it of the seventh section of the British statute? It gives room for a declaration of trust by parol; but it does not make that a trust, which was not a trust before. *It seems to me*, the 'declarations or creations of trusts or confidences' prohibited by the British statute, and tolerated by our own, are such as the grantor of the legal estate is competent to make, as a further disposition of the beneficiary interest, and not the confession of a condition or agreement, subsequently fastened on the title by the grantee. The first may be evidenced by the declaration of either party to the conveyance, with the assent of the other; and it vests an equitable title under our statute. But were the second permitted to have an effect forbidden to any other executory con-

* Does the Chief Justice mean that the *consideration* for a parol estate, makes any difference by the Act of 1772? This is directly contrary to the express words of the Act; "any consideration for making any such parol leases or estates, to the contrary notwithstanding."

tract for the title, it would be pregnant with all the danger intended to be guarded against by either statute. Even when restrained to gratuitous trusts expressed at the execution of the conveyance, these parol declarations will be found sufficiently introductive of frauds and perjuries; but with the qualifications indicated, they may certainly be sustained by parol proof. In other cases, the declarations of the grantee are admissible under our Act, as they are admissible under the British statute; namely, as confessions by the party of a fact from which the law implies a trust, but does not raise it from their immediate and necessary effect."

No further remark is intended to be made in this place upon these distinctions, than that they are new, and do not profess to be founded upon any previous adjudication; that they regard the interpretation of the Act as at that time unsettled, and not as having been settled by the cases the Chief Justice afterwards cites in *Randall* v. *Silverthorn*, and in *Dyer* v. *Cornell;* and that they spring from a very wholesome apprehension of the consequences that must follow from a settled doctrine that trusts generally are not included in the Act of 1772. They show, it is conceived, that the Court could not, at that time, have regarded such a doctrine as settled in any degree, or under any limitations. The Chief Justice seems to be clear, that one trust is not within the act, and may be proved by parol, namely, a *gratuitous* trust declared by the *grantor with* the assent of the grantee, or *vice versa*, at the time of conveyance, and that the Act of 1772 leaves no other trust to be sustained by parol. It will be far from well, even if it is so; but if the Court had then thought it settled by the cases to which the Chief Justice refers in *Randall* v. *Silverthorn*, "that a trust is not within the Statute of Frauds," they would simply have inquired whether *Kisler* v. *Kisler* was a case of trust, and if it was, then they must have given the proofs the same effect as if there were no Statute of Frauds. The distinction between different kinds of trusts cannot be a distinction arising upon the Act, if the Act does not extend to trusts at all. If it was a trust, supposing the proof of it to be written, why was it not a trust, the proof being by parol, if the Act which requires writing does not extend to trusts?

The class of gratuitous trusts referred to by the Chief Justice, if they are to be sustained by the Court upon parol proof, are the most dangerous of any, understanding the words to mean trusts declared without any valuable consideration, which was the case in *Kisler* v. *Kisler*, as it also was in *Murphy* v. *Hubert*. The averment of a consideration for declaring or transferring a trust, frequently gives the means of exposing the fraud and perjury upon which the averment is founded. It opens an inquiry into the fact of the party's having the consideration to dispose of, how he obtained it, in what manner and under what circumstances he paid or delivered it, and why he did not take a receipt for it, in fine, a new class of facts, in swearing to which, perjury must have un-

common success to escape detection.* But if gratuitous trusts can be sustained by parol proof, what is to prevent any person from setting up a trust declared by a grantor with the assent of the grantee or *vice versa* at the time of conveyance, and proving both the declaration and the assent by perjury? And if a *written* declaration of trust by the owner of land, after he has purchased it, is a valid trust that a Court of Equity will sustain, under the Statute of Frauds in England, why is it not to be sustained here, upon parol proof, if the Act of Frauds does not apply, and parol proof is as good as written? And how can any decision as to trusts be said to repeal the Act of Frauds, if the Act of Frauds does not apply to trusts? If the Act, according to settled doctrine, did not, in the Court's opinion, apply to trusts, the Court, it is apprehended, would have perceived that they were thrown back upon the principles of evidence and of equity, as they were received and acted upon before the Statute of Frauds, and would not have confined themselves to an elaborate separation of one class of trusts from others. As the Court, however, in *Kisler* v. *Kisler*, decided against the evidence as sufficient to sustain the alleged trust, these remarks of the Chief Justice upon the general construction of the Act, must be regarded as *obiter*, and as suggestions for further consideration, and not as the result of the previous adjudications, which were not cited.

But after all the cases referred to by Chief Justice Gibson as settling the law, that the Act of Frauds does not include a trust, and so late as 1845, another case occurred, which it is quite impossible to reconcile with any such opinion in a majority of the Court.

The case of *Sample* v. *Coulson*, 9 Watts & Ser. 62, was an ejectment in which the defendants gave in evidence a deed dated

* A remarkable instance of protection against fraud through the false averment of a consideration, occurred some years since in the Supreme Court.

A person in this city by some means became possessed of a sheet of post paper bearing the genuine signature of the late John Gardiner, junior, a merchant of large property and extensive business. Mr. Gardiner was in the practice, when the mail hour was at hand, of signing his name in blank, to sheets of letter paper, and delivering them to his clerks to write over his name a transcript of letters that he had previously drafted, or written in his copy book; and it was supposed that the sheet in question was one of these sheets, and had been lost through carelessness, or obtained through misconduct in his counting-house.

Over this signature, to which a seal had been annexed, a formal obligation was written, conditioned for the payment of a very considerable sum, at a day some years distant, to the person who sued Mr. Gardiner for the amount; and the sealing and delivery purported to be witnessed by two persons, who were living in the city at the time the bond bore date, but at the institution of the suit were dead.

Evidence was given to prove that the signatures of the witnesses were genuine, but it was met by strong evidence that they were forgeries; and as this turned pretty much upon opinion and comparison of hands, the case was not perfectly clear either way. But the plaintiff having been called upon to show the consideration he had given for the bond, there was not the least difficulty in proving that in material parts the story was false, in other parts improbable, and incredible in the whole; and the jury had no hesitation whatever in finding a verdict for the defendant, which his counsel did not attempt to question.

19th Oct. 1824, by James Johnston and John Kelly, administrators of John Sample, deceased, to Josiah Johnston, and then called James Johnston, and offered to prove by the witness, that the land mentioned in the deed was sold by him and Kelly, as administrators, to Josiah Johnston, and was purchased by Johnston in trust for Sarah, Catherine and Rebecca Sample, daughters of the deceased, and sisters of the defendants, and that it was so declared by him *at the time* and since; to be followed by proof that they and the defendant, with their consent, had been in possession ever since the purchase. This evidence was rejected by the Court, and an exception taken by the defendants.

There were other exceptions to evidence, upon which the Supreme Court reversed the judgment below, and ordered a *venire de novo;* but upon this exception, the opinion of the Court, delivered by SERGEANT, J., was in these terms: "But a trust cannot be established by the proof of parol declarations made by a purchaser at the time of his purchase or afterwards. *This would be in direct violation of the provisions of the Act of Assembly to prevent Frauds and Perjuries, which requires interests in lands to be created or transferred by writing.* It is true there are exceptions admitted on equity principles, of a resulting trust arising from the payment of money by the cestuy que trust for the purchaser,—or of a parol contract of sale, and possession taken, and money paid by the vendee,—or cases of fraud or mistake in the preparation or drafting of instruments; but a mere parol declaration by a purchaser who has taken the deed in his own name, and paid his own money, cannot be admitted as competent to establish a trust in favour of third persons, without subverting the provisions and frustrating the design of the statute. Nor can the intent or design of the purchaser to take the land for the use of third persons, be entered into by evidence *other than writing*, where the case does not fall within those exceptions which equity has established, and which have been adverted to."

This was the case of a gratuitous trust declared by the grantee, with the assent of the grantor, at the time of the purchase and afterwards,—the very case put in *Kisler* v. *Kisler*, and it says in plain words, though not *in totidem verbis*, that the Act of Frauds of this State does extend to trusts, and with no other exceptions than exist under the Statute of Frauds in England. A majority of the Court could not, therefore, have supposed that the contrary was settled by the cases referred to by the Chief Justice in *Randall* v. *Silverthorn*.

How this case came to be overlooked in *Murphy* v. *Hubert*, or how *Murphy* v. *Hubert* can stand with it, it is difficult to say, unless another distinction is to be drawn, between a trust declared by the purchaser with the assent of the grantor, and a trust declared by the grantor with the assent of the purchaser; and yet such a distinction is rejected by the Chief Justice in *Kisler* v. *Kisler*,

where he says such a parol trust "may be evidenced by the declaration of either party to the conveyance, with the assent of the other."

Murphy v. *Hubert*, therefore, takes new ground, not enforcing what has been settled, but overruling what has been settled by the same Court; and in this conflict of decisions, of the most distressing influence upon rights of property, and the interests of the community at large, it becomes worthy of deliberate inquiry, not which construction is most consistent with the public safety, for the Chief Justice himself has expressed his apprehensions of the danger of his own construction, but which is most consistent with the meaning of the Act of Frauds, and with the jurisprudence and juridical history of Pennsylvania.

And it is due to the Chief Justice to set out specially the reasons assigned by him for the judgment in *Murphy* v. *Hubert*.

It was a bargain and sale by A. to B. and her heirs for her own use, subject to the payment of a paramount ground rent to the person from whom A. derived title. What consideration was given to the grantor was doubtful: but a part of the parol evidence was to the effect, that when A., the grantor, delivered the deed to B., the grantee, he declared it to be in trust for the two daughters of A. The Judge of the Court below charged the Jury that the Act of Frauds requires all trusts, &c., to be put in writing, except such as arise by operation of law; and an exception being taken, the case was considered and decided narrowly upon this point, and the judgment below reversed by the Supreme Court. Chief Justice Gibson places his construction of the Act of 1772 upon the following grounds:

1. "That the first three sections of the English Statute, forming by consolidation the first in our Act, are applicable exclusively to legal estates, is demonstrable (he says) by the fact that trusts were specifically provided for in the omitted section, though those sections, like our own section, contain the clause 'in law or equity,' on which the opposite hypothesis is founded."

2. "The obvious design of it ('the clause in law or equity') was to prevent an equitable estate from being *transferred;* and the design of the 7th section was to prevent a trust estate from being *created* by parol. To be convinced of this, it is necessary only to compare the first and seventh sections side by side."

3. "What then do we gather from our own statute, in which the seventh is omitted? Beyond a doubt, an equitable estate in Pennsylvania, such as the interest of a vendee by articles of agreement, cannot be conveyed by parol without part execution by delivery of possession, and this by force of the statute in question, for the recording acts do not make registry essential to the validity of a conveyance; but it is a different thing to control the creation of a parol declaration of trust."

4. "Now all this was known to the transcriber of the adopted sections of the English statute; for it is evident from the masterly manner in which they were consolidated by him,* that he was a

* The Chief Justice's liberal disposition to give praise to every one who deserves it, has, in this instance, given to some unknown person a degree of praise that is not merited by anybody. The first three sections of the 29 Car. 2, c. 3, are but *one enactment*, as the printed statute shows; and the consolidation is effected solely by destroying the distinction of paragraphs, and striking out after the words which except leases not exceeding the term of three years, these words: "whereupon the rent reserved to the landlord during such term, shall amount unto two third parts at the least of the full improved value of the thing demised"—and also the words "not being copyhold or customary interest."

This is readily shown by placing the first section of the Act of 1772, and the three paragraphs which constitute the first section of the statute 29 Car. 2, c. 3, in parallel columns.

Act of 21 *March*, 1772.

Sec. 1. From and after the 10th day of April, 1772, all leases, estates, interests of freehold, or term[s] of years, or any uncertain interest of, in, [to,] or out of any messuages, manors, lands, tenements, or hereditaments, made or created by livery and seizin only, or by parole, and not put in writing, and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only, and shall not either in law or equity be deemed or taken to have any other or greater force or effect, any consideration for making any such parole leases, or estates, or any former law or usage to the contrary notwithstanding;

except, nevertheless, all leases not exceeding the term of three years from the making thereof;

and moreover no leases, estates, or interests, either of freehold or terms of years, or any uncertain interest of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, shall, at any time after the said 10th day of April, 1772, be assigned, granted, or surrendered, unless it be by deed or note in writing, signed by the party so assigning, granting, or surrendering the same, or their agents thereto lawfully authorized by writing, or by act and operation of law.

Statute 29 *Car.* 2, *c.* 3.

Sec. I. That from and after the 24th day of June, 1677, all leases, estates, interests of freehold, or terms of years, or any uncertain interest of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, made or created by livery and seizin only, or by parol, and not put in writing, and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only, and shall not either in law or equity be deemed or taken to have any other or greater force or effect, any consideration for making any such parol leases, or estates, or any former law or usage to the contrary notwithstanding.

II. Except, nevertheless, all leases not exceeding the term of three years from the making thereof, *whereupon the rent reserved to the landlord during such term shall amount unto two third parts at the least of the full improved value of the thing demised.*

III. And moreover that no leases, estates, or interests, either of freehold or terms of years, or any uncertain interest, *not being copyhold or customary interest*, of, in, to or out of any messuages, manors, lands, tenements, or hereditaments, shall, at any time after the said 24th day of June, be assigned, granted, or surrendered, unless it be by deed or note in writing, signed by the party so assigning, granting, or surrendering the same, or their agents thereto lawfully authorized by writing, or by act and operation of law.

As a guard against perjury in sustaining a parol lease for three years or under, the clause in the second paragraph of the first section of the statute, omitted in the first section of the act, would have been useful, and ought to have been retained. The omission of copyhold tenure was a matter of course. The adoption of other sections of the Statute of Frauds, 29 Car. 2, c. 3, and the omission of the rest, required no other skill either in adopting or rejecting, than such, as will be seen, an ordinary acquaint-

lawyer of no little skill; and why was the seventh section with several others omitted? Certainly to prevent its provisions from becoming the law of the land. And how can we make them the law of the land in the face of such demonstration of legislative intention?"

5. "Our decisions in support of resulting trusts are founded on an assumption that we dare not" (make its provisions the law of the land); "for as such trusts are excepted in England only by force of the eighth section, which is also omitted, it would follow that if the creation of parol trusts is forbidden by our statute, there would be no exception at all to it, because we would look into it in vain for a sentence on the subject. No clause in it could be tortured into a provision for implied estates, but the concluding one, which declares that 'no leases, estates, or interests, either of freehold or terms of years, or any uncertain interest of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, shall at any time be assigned, granted, or surrendered, unless by deed or note in writing, signed by the party so assigning, granting, or surrendering the same, or their agents thereto lawfully authorized by writing, *or by act and operation of law.*' But the last words relate, not to the creation of trusts, but to *leases*, which may be surrendered by act and operation of law."

6. "As was intimated in *Pugh* v. *Good*, 3 Watts & S. 56, much misconception has arisen by looking into the English statute, and the decisions upon it, and not exclusively to our own. Perhaps no decision has declared in words, that an express parol declaration of trust is valid in Pennsylvania; but all the decisions in support of implied trusts have gone on a principle which extends equally to them. Had the substance of the seventh section been adopted by the courts here, it might have been considered as a peculiar part of our common law; but the current of judicial decision has undoubtedly swept the other way."

The numerals prefixed to the preceding paragraphs, are made for more convenient reference in the following remarks. In the original opinion, according to the report, the whole is continuous, or without separation by paragraphs. And to these reasons for the judgment in *Murphy* v. *Hubert*, in their order, as well as to the judg-

ance with the law of Pennsylvania as it then stood, must have shown to be expedient. This will appear by the subsequent remarks in the text.

The history of the Act of Frauds of 1772 is not otherwise to be obtained than from the "Votes of Assembly," and this Journal gives but a very imperfect account of the matter. The Bill after being passed by the House in its present form, and presented to the Governor for his approbation, appears to have been returned by him to the Assembly with *amendments*.—6 *Votes of Assembly*, 358. The House did not concur, p. 367. In this last page it is called *an amendment;* and the Governor in his reply intimated to the Assembly that he would waive it, if the Assembly should adhere to the Bill as it was sent to him. The Bill being engrossed by order of the House, was again presented to the Governor and signed. An ineffectual search has been made in the Secretary of State's office, to ascertain what was the character of the amendment proposed by the Governor; but it appears that there is no record of the Governor's message remaining in the office.

ment itself, the following objections are submitted to the learned reader.

1. The "opposite hypothesis," of which the Chief Justice speaks, that equitable and legal estates are equally comprehended within the Act of 1772, is not founded upon the phrase, "either in law or equity," contained in the first clause of the first section, which is also in the first section of the English statute, but upon the much broader and firmer ground, that the words of the Act, according to the usage in Pennsylvania legislation, and immemorial acceptance by the courts and the profession of similar language in acts of Assembly, comprehend both legal and equitable estates, when there is nothing in the act in which they are found, plainly to indicate the contrary. And in the Act of 1772, there is not a word to indicate the contrary, either plainly or otherwise.

In *Withers' Appeal*, 14 Ser. & R. 193, the late Judge Duncan did rely upon the words "either in law or equity," as showing that the enactment comprehended trusts; and they are not without some weight to this effect, because they show that the Legislature meant to prevent the creation of an estate in equity by parol, as much as an estate in law. Whether they meant to prevent such an estate from arising in equity by the parol creation of an equitable estate, as much as they certainly did to prevent it from arising by the parol creation of a legal estate, is not to be shown conclusively by these words. That must depend upon the sense in which the context is taken. They do not *necessarily* sustain the opposite hypothesis; but they do it persuasively, by adding to the weight of other and more powerful reasons.

It may be admitted that the specific provision for trusts in certain sections of the English Statute, *demonstrates* that the three first sections or paragraphs of *that Statute* are exclusively applicable to legal estates; but it by no means follows, that the same is demonstrable of the first section of the Act of 1772, which Act contains no such specific provisions. If it is *only* by force of the provisions in other sections of the Statute, that this construction is given to its first three sections, the absence of such provisions in the Act, should prevent that construction from being given to its first section. The construction of the Act must be made upon the words of the first section of the Act, and upon the mischief to be remedied, for there is nothing else in the Act to govern it. The omission of certain sections of the Statute, which influence the construction of the first section of the Statute, instead of demonstrating the meaning of our Legislature in the section they have retained, ought to have no such influence upon it. On the contrary, the omission of those sections is a reasonable ground to infer that the Legislature meant the section they retained to speak for itself, and that its meaning should not be modified by the omitted sections, as they have modified the meaning of the Statute. The construction of one section of an act of Assembly, may be very reasonably

affected by another section in the same Act; and so it may be affected by a section in another Act of Assembly *in pari materia.* The object of interpretation in such instances, is to ascertain the meaning and purpose of the same legislature speaking at different times, or in different places, and supposed, at all times and in all places, to use the same words, with the same meaning, unless the context of the Act shows otherwise. But it is a very different thing to seek the meaning of the Legislature in the adoption of one section of a foreign statute, by resorting to other sections of the foreign statute which it has not adopted, especially when the effect of the omitted sections is to deprive the adopted section of its natural and proper meaning in the State which adopts it.

The argument of the Chief Justice is itself an hypothesis, and appears to involve an error in logic, because it passes from the hypothesis to the thesis, or to the proposition affirmed, without proving one of the supposed conditions or principles to be true.

The following appear to be the conditions upon which the Chief Justice asserts the proposition that the words in the first section of the Act of 1772, mean legal estates only.—The words in the first three sections of the Statute are the same as the words in the first section of the Act. The Statute provides for trusts by other sections. The Act does not provide for trusts by other sections. The words in the first three sections of the Statute mean legal estates only. Therefore the words in the first section of the Act mean legal estates only.

The error, with submission, lies in the last condition, namely—that the words in the first three sections of the Statute mean legal estates only. This is not proved, and the contrary may be affirmed with great safety, and by undeniable authority. Those words comprehend *all estates*, legal and equitable. They are the same words which, in that very Act of Parliament, have been held to comprehend both kinds of estates.

If the statement of the condition had been that these words *have been held or supposed in the interpretation of the first three sections of this particular statute*, to mean legal estates only, the question would have arisen, *why* has this happened? Has it been in consequence of their own proper meaning, or has it been by the influence of other sections in the same Statute? And if the last had been assumed to be the true reason, or had not been shown to be otherwise, then it would have been seen, that the omission of those other sections in the Act of 1772, did not prepare the conclusion logically, that the words in the Act mean legal estates only.

If the first three sections of the Statute 29 Car. 2, c. 3, by the proper meaning of the words, comprehend legal estates only, the reference to other sections of that Statute, which the Act does not contain, is of no importance, and should have been omitted; and if, on the contrary, the proper meaning of those words in an Act of Parliament, and especially in a Pennsylvania Act of Assembly, com-

prehends both equitable and legal estates, and it is only by force of the trust sections in the Statute that the words in the first three sections are restricted to mean legal estates only, then the omission of those trust sections in the Act of 1772, instead of justifying the proposition, that the words of its first section are restricted to mean legal estates only, do, on the contrary, justify the denial of that proposition.

There is, undoubtedly, an omission in the Act of 1772, of the 7th, 8th and 9th sections of the Statute 29 Car. 2, c. 3, and of several other very important trust sections of that Statute; but the remarks hereafter made are intended to show, and unless the writer is chargeable with great misapprehension, will prove, that the variations of the Act from the Statute are to be attributed, not to different designs in the two Legislatures,—in Parliament to provide for trusts, and in the Assembly not to provide for them, which, considering the equal importance and the equal danger of trusts, would have been almost an act of folly,—but to the same design in the Assembly that existed in Parliament, to provide for and protect both against the perjuries of parol evidence; and that the cause of variation is this, that in Pennsylvania the settled meaning of the words in the first section, both in courts of law, and in legislative use, was a sufficient provision for trusts, without anything more specific in the Act; whereas the stricter acceptation in which the same words were sometimes taken in English Courts of Law, was thought to make a specific provision in the Statute expedient, to prevent all uncertainty. The Statute was the work of an English Chancellor, always awake to the difference in different courts between the law meaning and the equity meaning of the same words. The Act of Assembly was the work of persons who knew that the difference was substantially nothing between the law and the equity meaning of these words in all their own courts; and had the Legislature of Pennsylvania made the same provision in the Act, to prevent a possible uncertainty, it will be found that they would not only have brought the same words in other Acts into uncertainty, where there had not been a like provision, but they would have unsettled the law of the Colony in regard to other matters of trust provided for by other sections of the Statute, which they have not copied.

Although the 7th, 8th and 9th sections of the 29 Car. 2, c. 3, by providing expressly for trusts in the same order, and with reference to the same modifications of conveyance, as the first three sections had provided for "leases, estates of freehold, or term of years, or any uncertain interest, of, in, or out of, any messuages, lands, tenements or hereditaments," do probably show that Parliament, by the first three sections, meant to provide for legal estates only, it is the 7th, 8th and 9th sections, and nothing else in the Statute, that shows this with anything like certainty or even great probability. In their absence, the better construction of the first

three sections, even in an English court of law, would have included equitable estates. But the complete analogy and correspondence between the three trust sections, the 7th, 8th and 9th of the Statute, and the first three sections, did infer a probable intention in Parliament to confine the operation of the first three sections to legal estates.

The first section or clause provides for estates, &c., *made or created* by parol, the 7th for parol *declarations or creations* of trust.

The second section provides for an *excepted case* of leases, the *eighth* for *excepted cases* of trusts by implication.

The third section provides for estates, &c., *assigned, granted or surrendered,* and the ninth for *grants and assignments* of any trust or confidence.

This orderly provision for both classes of estates and conveyances, by two sets of sections, is probably sufficient to show that by "leases, estates, interests of freehold," &c., in the first series, were meant legal estates only. But it is by no means true universally or even generally, that the words "all leases, estates, interests of freehold, &c., in lands, tenements and hereditaments," in Acts of Parliament, mean legal estates and interests exclusively. These words, in an Act of Parliament, do not necessarily nor even properly mean legal estates, and interests only, unless the intention to restrict the meaning, can be gathered from the context, or from the mischief intended to be remedied. In a court of law, the words "estate in lands and tenements" may be understood to mean a legal estate only, because, in general, a court of law will not take notice of a trust; but in a court of equity it will be understood to mean a trust also, because, in equity, a trust is the land and tenement; and there are memorable cases in which both courts have held these words, in an Act of Parliament, to mean both legal estates and trusts. It depends, in a great degree, upon the mischief that is intended to be remedied; and if the mischief affects trusts as much as legal estates, no instance, it is believed, can be found in which the words are restricted by construction to legal estates only, unless in the Act of Parliament there is a special provision to meet the mischief in the case of trusts.

Even "*seisin* in fee simple or fee tail" may mean, and in 17 Geo. 3, the Annuity Act, it has been held to mean, seizin either in equity or in law. So Lord Thurlow held in *Shrapnel* v. *Vernon*, 2 Bro. C. Rep. 271, though cestui-que-use, strictly speaking, is not seized, but possessed of the use. Lord Thurlow said, "I think an estate in equity in fee simple or fee tail is, in this respect, the same as if it was a legal estate. In many Acts of Parliament, an equitable estate is considered the same as if it was a legal estate."

In *Amhurst* v. *Skynner*, 12 East, 270, Lord Ellenborough said to the very point,—"When it is said *in pleading*, that a party was seized in fee, I should understand by that a legal seizin in fee, for that is the obvious and proper sense of the words; but when those words are introduced, as they are in these pleadings, with refer-

ence to the enrolment of a memorial, according to the direction of the Annuity Act, I must construe them *secundum subjectam materiem*, as connected with the Act of Parliament to which they refer." And Lord Eldon decided the same way in *Tucker* v. *Thurstan*, 17 Ves. 131. See also *Burgess* v. *Wheate*, 1 Eden, 226.

And what is more to the purpose, *uses* were not within the letter of the Statute *de donis*, the language of which was, that the will of the donor should be observed, so that the power of alienation after issue born, should not exist in those "*quibus* TENEMENTUM *sic fuit datum*;" yet uses were taken within the equity of the Statute, and followed the nature of the land. *Corbet's case*, 1 Rep. 88, a.

So also *trusts* are within the Statute *de donis*. Though it was held otherwise in *Bowater* v. *Elly*, 2 Vern. 344, and in other cases, Lord Hardwicke, in *Kirkham* v. *Smith*, Ambl. 518, with great clearness overruled them, and said it would confound the rules of property to hold otherwise.

So the Statute of Westminster 2d, 13 Edw. 1, c. 18, which allows the plaintiff, in an action of debt or for damages, to have a fieri facias, or that the sheriff shall deliver all the chattels of the debtor, "*et medietatem* TERRÆ SUÆ," authorises the sheriff to extend a term of years. 2 Inst. 396; *Fleetwood's case*, 8 Rep. 171, a; *Hungry* v. *Fry*, Moor. 341, pl. 462.

So the Statute of Wills, 32 H. VIII., c. 1, and the Statute of Explanations of Wills, 34 & 35 H. VIII., c. 5, give the devising power to persons having any *manors*, *lands*, *tenements or hereditaments* of inheritance in fee simple, either a sole estate or interest in fee simple, or *seized* in fee simple in coparcenary, &c.; yet trusts were devisable under those statutes. 1 Cruise, 485; *Cornbury* v. *Middleton*, 1 Cas. in Chan. 211; *Greenhill* v. *Greenhill*, 2 Vern. 680; *Burgess* v. *Wheate*, 1 W. Black, 180; 2 Eden, 194, 224, 225.

But the best illustration is obtained from the Statute of Frauds itself, in one of the sections of which the very words used in the first section are constantly held to mean trust estates as well as legal estates, in order to suppress the mischief, and to extend the remedy intended by the Statute.

In *Wagstaff* v. *Wagstaff*, 2 P. Wms., 258, after the Statute of Frauds, Lord Chancellor Macclesfield held that a will by cestui que trust, attested but by two witnesses, was void; yet the fifth section of the Statute of Frauds, which requires three witnesses, has not the word *trust* in any part of it, but speaks only of all devises and bequests of *lands and tenements*, the same words which, in the first section, are supposed to comprehend only legal estates.

The language of the Lord Chancellor is very pertinent to the present inquiry. "There could be no question," he says, "that a trust of an inheritance could not be devised otherwise than by a will attested by three witnesses, in the same manner as a legal estate; for if the law were otherwise, it would introduce the same incon-

veniencies as to frauds and perjuries, as were occasioned before the Statute, by a devise of a legal estate in fee simple."

Sir Joseph Jekyl held the same at the Rolls three years afterwards, declaring, in regard to a devise, that "the trust and equity of redemption of all lands of inheritance are within the Statute of Frauds." 2 P. Wms., 261.

In *Burgess* v. *Wheate*, 1 W. Black, 160, Lord Mansfield said, "The Statute of Frauds and Perjuries speaks of devises only of *lands and tenements*; yet the trust being considered in this Court as the land and tenement, can only be devised as lands and tenements may pursuant to that Statute."

The words of the first three sections of the Statute of 29 Car. 2, c. 3, were, therefore, broad enough to comprehend equitable as well as legal estates, and probably would have been so interpreted, but for the seventh, eighth and ninth sections, which made that interpretation unnecessary.

It is therefore not only *not demonstrable*, but very far from being clear, without referring at all to the well-known condition of trusts in Pennsylvania, and to the incidents of trust estates, and the remedies for them, in our Law Courts, hereafter to be noticed, that the omission of the seventh, eighth and ninth sections ought to be regarded as evidence of an intention in the Legislature of Pennsylvania, to make the first section of the Act of 1772, protect legal estates, and to leave trust estates without any such protection. On the contrary, it is clear that the language of the Act will protect both, if it is permitted to speak its natural Pennsylvania meaning; for in Pennsylvania immemorially, both in the courts of law, and in legislative usage, the trust has always been considered "as the land or tenement," as much as it has been, or is, at this day, in an English Court of Equity.

And it can be made perfectly clear, that this was *affirmatively* the intention of the Legislature, by adverting to the omission by the Act of 1772, of other trust sections in the 29 Car. 2, c. 3, which were omitted for the same reason, because they were unnecessary in Pennsylvania, where these other trust provisions of the Statute had always been the law, by virtue of Acts of Assembly containing the same or similar words to those used in the first section of the Act of 1772.

To do this with effect, it will be useful to give a summary statement of all the sections of that Statute, and of the relative legislation of Pennsylvania from time to time upon the same subjects: and it will now be given.

The *first three sections* of the 29 Car. 2, c. 3, and the slight change made by consolidating them in the first of the Act of 1772, require no further remark.

The *fourth section*, which prohibits actions upon certain promises, and among others, "upon any contract or sale of *lands*, *tenements* or *hereditaments*, or any interest in or concerning them,"

unless the agreement or a memorandum of it shall be in writing, and signed by the party to be charged, or some other person thereunto by him lawfully authorized, is not in the Act of 1772, and has not been adopted by any subsequent Act of Assembly of Pennsylvania. A verbal contract or sale of lands, tenements or hereditaments, or of any interest in or concerning them, is good to sustain an action for damages in consequence of the breach of it; but no interest in the lands, either at law or in equity, passes by force of it; and it is well settled that specific performance of such an agreement cannot be enforced through a cautionary verdict for damages, to be released upon the conveyance of the land by the defendant to the plaintiff. *Wilson* v. *Clarke*, 1 Watts & S. 554; *Ellet* v. *Paxson*, 2 Watts, & S. 433. See *Huber* v. *Burke*, 11 S. & R. 238; *Irvine* v. *Bull*, 4 Watts, 287. It would probably strike the profession as a very dangerous novelty, to say, that this is true only as to verbal contracts for the sale of a legal estate; and that as to a contract for the sale of an equitable estate, since the Act of Frauds does not relate to such estates, specific performance might be obtained through a cautionary verdict for the breach of it. Such a distinction has never been heard of.

The *fifth section* of the Statute, which requires the attestation of devises and bequests of *lands and tenements*, by three or four subscribing witnesses, is also omitted in the Act of 1772, and was rejected by the Colonists, even before they left England.

By the Laws agreed upon in England, May 5, 1682, six years after the Statute of Frauds, it was declared "that all wills, in writing, attested by *two* witnesses, shall be of the same force as to lands, *as other conveyances*, being legally proved within forty days, either within or without the said Province." Miller's Laws, App. 1, sec. 15. And that by *lands*, they meant any estate in lands, legal or equitable, is beyond all dispute.

The *Great Law*, ch. 45, enacted the same in the Province, Dec. 7, 1682. Miller's Laws, App. 4. Another act was passed in 1700, requiring nothing more than *legal proof*. Miller's Laws, App. 12. And this being repealed by the Queen in Council, the Act of 1705 was passed, which has ever since remained the law of Pennsylvania. Miller's Laws, 23; *Lewis* v. *Maris*, 1 Dall. 278.

The language of this act is "that all wills in writing wherein or whereby any *lands, tenements, or hereditaments*, within this province have been, are, or shall be devised, being proved, &c., shall be good and available in law for the granting, conveying, and assuring of the lands, or hereditaments, thereby given or devised, as well as of the goods and chattels thereby bequeathed." No one has probably ever suggested a doubt, nor is it possible to entertain one, that this language applies to wills of trusts or equitable estates, as much as to wills of legal estates.

The *sixth section* of the Statute of 29 Car. 2, c. 3, which declares how devises of lands, tenements, or hereditaments may be revoked,

is not in the Act of 1772, and was not introduced into the Act of 1705, nor has it ever been adopted, although the Act of 1705 does introduce the 22d section of the Statute, in regard to the repeal of wills of chattels. So far as the 6th section altered the law as it was held under the Statute of Wills, it altered it by an obscure provision, which required a higher proof in one respect of a *writing* in revocation of a former will, than if it was itself a will, and a lower proof in another respect. *Clerke* v. *Hoil*, 3 Mod. 219; *Eggleston* v. *Speke*, 3 Mod. 258. Our ancestors, in that memorable session of 1705, which may be regarded as the 13 Edw. 1 of Pennsylvania, wisely rejected a section which the courts in England had shown to be, at least in one of its provisions, unreasonable, and which was not necessary in any respect for Pennsylvania.

The *seventh*, *eighth*, and *ninth* sections of the Statute are the trust sections before adverted to, which the Act of 1772 omits, and which at present require no further remark. They are the hinges of the question under consideration.

The *tenth and eleventh sections* are very material to the present inquiry, and are worthy of special attention.

They also are trust sections. Both of them are omitted in the Act of 1772, and the reason why they were omitted, beyond all doubt, was because the distinction between trusts and legal estates in Pennsylvania was of no substance in relation to the provisions contained in those sections, the trust having always been considered, in a Pennsylvania court of law, as much the land and the estate as the legal estate itself, and within the meaning of the Execution Act of 1705, and the Intestate Act of the same year, and therefore already comprehended by their enactments in regard to estates and interests in lands, tenements, and hereditaments.

The Act for taking lands in execution for payment of debts, passed in 1705, Miller's Laws, 37, enacts, "to the end that no creditors may be defrauded of their just debts, due to them from persons who have sufficient real if not personal estates to satisfy the same,—that all such *lands*, *tenements*, *and hereditaments* whatsoever, within this Province, where no sufficient personal estate can be found, shall be liable to be sold upon judgment and execution obtained."

The Intestate Act of 1705, Miller's Laws, 26, enacts "that if any person or persons shall die intestate, being the owner of *lands or tenements* within this Province, and leave lawful issue to survive them, but not a sufficient personal estate to pay their just debts and maintain their children, in such case it shall be lawful for the administrator of such deceased, to sell and convey such part or parts of the said *lands or tenements*, for defraying their just debts, &c., as the Orphans' Court shall think fit to allow; and "that the surplusage or remaining part of the intestate's *lands*, *tenements*, *and hereditaments*, not sold by virtue of this act, &c., shall be divided between the intestate's widow and children, or survivors of them,

who shall equally inherit and make partition as tenants in common may or can do."

The first of the two sections of the Statute of Frauds now under consideration, the tenth, namely, makes *trust* estates liable to execution upon a judgment, &c., against the *cestui que trust*, and makes a *trust* estate which descends to an heir assets by descent, and the heir chargeable with the obligation of his ancestor by reason of such assets, as fully as if the *estate at law* had descended to him in possession in like manner as the trust. And the eleventh section is a proviso to the tenth, that the heir who shall so become chargeable, shall not by reason of any plea or confession of the action, or by suffering judgment by *nient dedire*, or by any other matter, be chargeable to pay the condemnation out of his own estate.

It is submitted with some confidence, as being free from all reasonable doubt, that these *trust* sections of the statute were omitted in the Act of 1772, because the words in the Execution and Intestate Acts of 1705, those same words, "lands, tenements, and hereditaments," did comprehend *trust* estates, and did expose them to execution for the debts of *cestui que trust*, and did make them assets in the hands of the heirs, as fully as they did *the estate at law;* and it is by force of these words, which *Murphy* v. *Hubert* decides do not comprehend trusts in the "Act to prevent Frauds and Perjuries," that trusts as well as legal estates have been liable to execution upon judgments against cestui que trust from the foundation of the Province, and assets by descent in the hands of his heirs. See *Graff* v. *Smith's Admrs.* 1 Dall. 481; *Lessee of Morris* v. *Smith*, 1 Yeates, 238.

It seems to be undeniable, therefore, that the same course of reflection, on the part of the committee of the Assembly, or of the person who prepared the Bill, which led to the omission of the tenth and eleventh sections in the Act of 1772, led also to the omission of the seventh, eighth, and ninth sections of the Statute. They were alike, and for the same cause, unnecessary in the Act of Assembly, because by settled construction in the Province, the words in the Execution and Intestate Acts, the very same words which are in the first section of the Act of Frauds, comprehended trusts for every purpose in any of those acts, for which they comprehended legal estates.

Generally speaking, there never has been a time in Pennsylvania, when a trust estate was not liable to execution upon a judgment against the *cestuy que trust*, and was not assets for the payment of all the ancestor's debts. Immemorially the trust estate, unless it was under such modifications as to exempt it from liability for debts of the *cestui que trust*, has been liable to execution as much as the legal estate, equally liable to dower and curtesy, and equally remediable by ejectment in the name of the *cestui que trust* in case of ouster. The word *estate* comprehended trust estates as

much as any other in the *Great Law*, which provided for the disposition of the estate a person had at his death, "his debts being first paid;" Miller's Laws, App. 4, ch. 109, 1683, ch. 172, 1684; and so did the words, "lands and goods," which the fourteenth law agreed upon in England, declared should be liable to pay debts, except where there was legal issue, and then all the goods and one-third of the lands only; and which, chapter 189 of 4 Jac. 2, 1688, Miller's Laws, App. 4, altered so, as, whether issue or not, to expose all lands to sale upon judgment and execution against the defendant, his heirs, executors or administrators. In the Act of 1700, Miller's Laws, 4, the comprehensive word used is *the owner*. "All lands and houses" were made liable to sale upon judgment and execution against the defendant, *the owner*, his heirs, executors and administrators.

The meaning of these enactments is shown in a very striking way by "An Act for the better confirmation of the owners of lands, and inhabitants in this Province, in their just rights and possessions," passed in 1705, Miller's Laws, 22. It recites, that the laws referred to had "made all lands and tenements, *without regard to the fee simple and other tenures by which they were held*, as liable to pay debts, as chattels, and to be taken and sold upon execution, or by decrees in Courts of Equity, or to be sold by such executors as had no power by their testators' wills for so doing, and in certain cases to be sold by administrators, as also to be divided, allotted and distributed amongst the widows and children of intestates;" and then "to the end that these sales, deliveries, assignments and allotments or distributions, may have effect according to the tenor and true meaning of the said laws, and that the possessors and owners of the said lands and hereditaments so sold, delivered, assigned and distributed, and their heirs and successors, may quietly have, hold and enjoy the same," it confirms "all bona fide bargains and sales for valuable consideration, as also all assignments, grants and allotments or distributions made to any person or persons whatsoever of any lands, tenements or hereditaments, according to the tenor and direction, or the true intent and meaning of the said laws in those cases made and provided, against all persons whatsoever; and that all persons, *according to their several estates and interests of, in and to, the said lands, tenements and hereditaments* so as aforesaid sold, delivered, assigned and allotted, shall hold the same against every person pretending any right, title, &c., whatsoever, saving to all persons, other than to the person or persons for payment of whose debts, &c., any of the said lands, &c., have been sold, and to their heirs, all such actions, estates, possessions, rights, titles, interests, profits or demands, as they or any of them have or ought to have, of, in, or to the said lands, &c., so as they pursue their rights, &c., by way of action or lawful entry before the 1st October, 1711."

This seems to show conclusively, that by authorizing the sale of

"lands, tenements and hereditaments" for payment of debts, either by execution or by executors or administrators, the laws meant any estate, legal or equitable, in fee simple, for life or otherwise, that the debtor had therein; and the Act above quoted, must have been passed, with the view to suppress the technical notion, that these words did not strictly import anything more than the *legal* or perfect estate vested in the debtor or decedent.

The Execution Act of 1705 uses the word *estate*, another word in the first section of the Act of Frauds, in the same universal sense, as comprehending the whole estate of the defendant, whether equitable or legal, more or less; and it enacts that the person to whom the sheriff sells and delivers the same, and his heirs, &c., shall hold the same as fully and amply, and for such estate and estates as he or they for whose debt the same was sold, could or ought to do before the taking of the same in execution.

The Act for recording of deeds of 28th May, 1715, and the Act for the better confirmation of estates of persons holding or claiming under femes covert, and for establishing a mode by which husband and wife may hereafter convey their estates, passed 24 Feb. 1770, are both of them interpreted in this sense: and the supplement to the Act for acknowledging and recording of deeds, passed the 18th March, 1775, proves this to be the well-known and authoritative construction, because it introduces into its third section an exception out of the general words, "of or concerning any lands, tenements or hereditaments," to exclude leases not exceeding twenty-one years from the operation of the Act, which was wholly unnecessary unless those words, in the sense of the Legislature, did comprehend leases, however short the term. Acts of Assembly, in fine, from the earliest day of the Colony down to the time of the Revolution, are remarkable in all these cases for avoiding technical references to tenure, to quantity of estate, to seisin, and to the quality of the estate, whether legal or equitable. The substantial estate, that which the party owned or could dispose of, either in equity or at law, was always intended by the description of Estate, or by that of lands, tenements or hereditaments, so that it became a rule of construction to be applied to those words in all Acts of Assembly, unless the contrary was expressed or necessarily implied by the Act itself.

If, then, the question be asked why the tenth and eleventh sections of the English Statute of Frauds, which are trust sections, were left out of the Act of 1772, as the seventh, eighth and ninth sections were, the answer is readily given: it was because, in legal acceptation, both in the Courts and in the General Assembly of the Province, a trust in land, had been from the beginning regarded as the land and the estate, as much liable to execution, and as much assets for the payment of debts, as the whole estate legal and equitable. To say that those sections were not adopted in the Act of 1772, because the Legislature did not mean they should be the

law of Pennsylvania, is a complete mistake. They had been the law of Pennsylvania from the earliest day, and by force of the very same words that are contained in the first section of the Act of 1772; and to have introduced the 10th and 11th sections of the Statute of Frauds into that act, or the 7th, 8th and 9th, would have been worse than superfluous, it would have raised a doubt where there was none before, whether *an estate or interest in lands, tenements or hereditaments,* does mean in an Act of Assembly anything more than a legal estate or interest.

The 12*th section* of 29 Car. 2, c. 3, makes estates *pur autre vie* deviseable by a will in writing signed and attested in the mode prescribed; and if no such devise be made, the Statute makes the same chargeable in the hands of the heir, if the estate come to him by reason of a special occupancy, as assets by descent, as in case of lands in fee simple; and in case there be no special occupant, it goes to the executors and administrators, and is assets in their hands. The Act of 1772 contains no such provision, but omits the section altogether.

This is another instance in which the settled acceptation of words used in Acts of Assembly in Pennsylvania, made a recurrence to the provision in the English Statute unnecessary.

The Statute of Wills 32 H. viii. c. 1, explained by 34 H. viii. c. 5, did not extend to any but estates in fee simple. The testamentary power as it existed before the Statute, did not comprehend an estate greater than a term of years. The laws agreed upon by the colonists in England, and the Acts of Assembly of 1700 and 1705, concurred in making Wills in writing, proved in the manner provided, *as good as any other conveyance,* for the granting of the lands, tenements and hereditaments thereby devised. Whether the estates devised were fee simple estates, or estates *pur autre vie,* legal or equitable, a will so proved passed them to the devisee—but always according to the Act of 1697, Miller's Laws, App. 10, the principle of which was retained in all subsequent legislation, *subject to the payment of the testator's debts;* and the Intestate Act of 1693, Miller's Laws, App. 10, by the short and popular expression, "being the owner of lands within this Province," certainly included an estate *pur autre vie,* as the Intestate Act 1705, Miller's Laws, 26, did by the words "shall die intestate being owners of lands or tenements within this Province."

These Acts consequently provided for estates *pur autre vie,* legal or equitable, and made them assets in the hands of devisees, and heirs under the intestate law, and in the hands of Executors and Administrators, and this was the reason why the 12th section of the Statute was omitted in the Act of 1772.

The 13*th*, 14*th*, 15*th, and* 16*th sections* of the English Statute, are the 2d, 3d, and 4th sections of the Act of 1772. They were adopted and made our own, because we wanted them. They require the day of signing a judgment to be entered on the docket, destroy the relation of judgments to the first day of the term, and

the relation of executions, so as to make them bind the goods of the defendant only from the time of delivery to the sheriff.

The 17*th section* invalidates contracts for the sale of goods for ten pounds sterling or upwards, unless the buyer shall accept and actually receive part of the goods sold, or give earnest to bind the bargain, or there be a memorandum of the bargain in writing, signed by the parties to be charged by the contract, or their agents lawfully authorized. It is an extension of the 4th section of the Statute, and being unfit for the Colony, was omitted in the Act of 1772, for the same reasons as the fourth.

The 19*th*, 20*th*, 21*st*, 22*d*, 23*d and* 24*th* sections of the Statute were introduced verbatim into the Act of 1705 concerning Probates of written and nuncupative Wills, and for confirming devises of lands, with the substitution of "two or more witnesses," for "three witnesses at the least," and "the Register-General's Office in the respective Counties of this Province," instead of the words "any Court."

The 25*th or last section* of the Statute is also the last or fifth section of the Act of 1772, applying the enactment to the Pennsylvania Intestate Act of 1772, as the English section did to the Intestate Act of 22 and 23 Car. 2, c. 10.

After this full reference to the different sections of 29 Car. 2, c. 3, it may be seen by the profession, whether the first section of the Act of 1772, ought to be construed as extending to legal estates only, from the mere fact that the 7th, 8th, and 9th of the English Statute are omitted. What the construction of the first of the Statute would have been, if it had not been followed by those sections, is, as has been remarked, very far from being clear. The probability is that it would have been held to extend to trusts. Trusts are undoubtedly within the mischief which the Statute meant to remedy; and interpreted, and extended by construction, as the Statute has been by Courts of Equity ever since its enactment, there is not, it will be found, a case of trust, implied, constructive, or fraudulent, that would not have been excepted from the enactment of the first section, as effectually as it has been by the 8th. Indeed the established construction in England of the 5th section in regard to devises of lands and tenements, *Whitchurch* v. *Whitchurch*, Gilb. Rep. in Eq. 171, is almost conclusive to show, that under the influence of Lord Macclesfield's reasons in *Wagstaff* v. *Wagstaff*, trusts would have been embraced within the first section by the decision of Courts of Equity, if the 7th, 8th and 9th had been altogether absent; for Chancery did construe the 5th to include devises of trusts, notwithstanding it uses only the words "lands, tenements, and hereditaments," as in the first section. And how vastly stronger is the reason for that interpretation by our Courts, when we find nothing in opposition to it in our Act of 1772—everything in favour of it, in the legislative and judicial history of the Colony and State,—and

the contrary interpretation has no better support than the omission of three sections of doubtful necessity in the English Statute, left out most probably if not certainly because they were thought to be worse than superfluous, their whole object being obtained by the first section of the Act under our settled acceptation of its language, and their introduction being likely to disturb this settled acceptation.

It is hardly necessary to fortify these remarks by adverting to the immense mass of equitable estates existing in Pennsylvania in the year 1772, which the construction in *Murphy* v. *Hubert* imputes to the Legislature the intention of leaving without any protection by the Act. All unpatented applications for land,—according to any but a Pennsylvania notion of modern times, all warrants and surveys unpatented, where the purchase money was not paid,—all articles of agreement for the sale of lands, (and these included a vast portion of the country estates,) were mere trusts; and when to these is added the great number of outstanding legal titles, after the object of trusts had been attained, and when there was no Court of Equity to compel a conveyance of them to the cestuy que trusts, and also the number which from mere indifference to the distinction between legal and equitable title, had been permitted to accumulate —it is not perhaps saying too much to say, that at the date of the Act of 1772, there were more trust estates than estates of the perfect kind in the State of Pennsylvania. It must be within the experience of the Chief Justice, that it was the institution of a Federal Court of Equity within this circuit, which alone brought the subject to the practical notice of either lawyers or conveyancers in Pennsylvania.

Before the second head of the Chief Justice's remarks on *Murphy* v. *Hubert* is brought under notice, it is deemed proper to advert to one further circumstance, as most cogent evidence drawn from the Act of 1772 itself, that the Legislature did affirmatively mean to comprehend trusts as well as legal estates, within all the provisions of that Act.

The third section of the Act of 1772 is copied from the fifteenth section of the English Statute. "Judgments, as against bona fide purchasers for valuable consideration of *lands, tenements, or hereditaments*, to be charged thereby, shall in consideration of law be judgments only from such time as they shall be so signed, and shall not relate to the first day of the term whereof they are entered."

Here the words "lands, tenements, and hereditaments" recur, and are the same that are used in the first section of the Act; and they are the words used in the Execution Act of 1705, to which, and not to the Statute of Westminster 2d, the Chief Justice in his learned judgment in *Allen* v. *Reesor*, 16 Ser. & R. 10, attributes the lien which has from that time, and probably from a previous Act of 1700, Miller's Laws, 4, always attended and accompanied a judgment of record. Can it be doubted that this lien has always

bound the lands of the defendant in the judgment, whether his title to them was equitable or legal? And if it cannot, then there can be no doubt that in the third section of the Act, the same description of estate was in view in the protection of purchasers for valuable consideration. Does the relation of judgments to the first day of the term whereof they are entered, exist in Pennsylvania as against a purchaser for valuable consideration of a *trust* in lands, tenements, or hereditaments? No one can say that it does. If it does not, the Legislature, by the third section of the Act of 1772, meant purchasers of *trusts* in lands, as much as purchasers of *legal estates* in them. Did they mean legal estates only and not trusts by the same words in the first section?

If the Chief Justice's reasoning in *Murphy* v. *Hubert* were carried out, it would show that "lands, tenements, and hereditaments," in the third section of the Act of 1772, mean *legal* estates only, and therefore that judgments, do as to purchasers of trusts, relate to the first day of the term; for as he holds that the omission of the seventh and eighth sections of the Statute, shows an intention in the makers of the Act not to provide for conveyances of trusts, it ought to follow, that the omission of the tenth section shows an intention not to provide for purchasers of trusts by the third. But that the third does provide for purchasers of trusts cannot be seriously questioned; and it provides for them only as the first should be held to provide for parol creations and transfers of trusts, by the comprehensive meaning of the words, as they have been received in the legislature and courts of Pennsylvania.

It may be remarked in conclusion upon this head, that unless an Act of Parliament which contains the words "interest or estate in lands, tenements, and hereditaments," does expressly or by implication plainly show to all courts that it means legal estates exclusively, courts of equity must necessarily hold that the words apply to trusts, because in such courts the trust is the estate and the land. And so it ought to be in all the Courts of Pennsylvania, where the subject before them is a trust, because those Courts are Courts of Equity as well as of Law, and when trust is the subject, are as much bound to regard it as the estate and the land, as a Court of Chancery is.

2. We must further be permitted to doubt the Chief Justice's position, that the obvious design of the clause "either in law or equity" in the first section of the Statute, and also in the first section of the Act of 1772, was to prevent an equitable estate from being *transferred* by parol, as the design of the seventh section of the Statute was to prevent a trust estate from being *created* by parol.

The first three sections of the Statute being confined, according to the hypothesis, to legal estates, it follows that the words, "either in law or equity," in one of those sections, must in that Statute have

reference to legal estates. Trusts being provided for in other sections of the Statute, it should follow that *transfers* of trusts are provided for in those other sections, or that they are not provided for at all. And the fact undoubtedly is, that they are expressly provided for in one of those other sections, namely in the ninth, to which no reference is made by the Chief Justice in his opinion.

The ninth section expressly enacts, that "all grants and *assignments* of any trust or confidence shall likewise be in writing, signed by the party granting or assigning the same, or by such last will or devise, or else shall likewise be utterly void and of none effect."

The foundation, therefore, upon which the Chief Justice places his opinion, that although a trust may be *created* by parol, yet that it cannot be *transferred* by parol, appears to fail.

If indeed the words "either in law or equity," which are found only in the first and not in the third section of the Statute, are confined in point of effect to the corresponding clause in the first section of the Act of 1772, then they do not relate to *transfers* at all, and do relate to *creations* of estates; for it is the third clause of the first section of the Act, corresponding with the third section of the Statute, that relates to assignments of estates, and that clause does not contain in it the words, "either in law or equity." And from this it must follow, if the first section of the Act applies to legal estates only, that the transfer of a trust by parol is not contrary to the third clause of that section, whatever may be the effect of the clause "either in law or equity" upon estates "made or created" contrary to its first clause. Supposing the whole section, however, to apply to equitable as well as to legal estates, its influence upon both kinds of estates is very clear; and upon trusts it is the same as upon legal estates, namely, that a trust estate made or created by parol, has the force and effect of an estate at will only, and a transfer or assignment by parol of a trust estate, has no effect at all.

3. If the first section of the Act of 1772 is applicable exclusively to legal estates, it seems difficult to derive from any part of that Act, any just ground of confidence in the opinion, that "an equitable estate in Pennsylvania, such as the interest of a vendee by articles of agreement, cannot be conveyed by parol, without part execution by delivery of possession, and this by force of the Statute in question"—the Act of 1772.

The Act of 1772 cannot prevent a parol conveyance of the interest of a vendee under articles, if it does not extend to trusts, for his interest or estate in the land is a trust, and nothing more; or if it be alleged to be applicable to trusts *transferred*, but not to trusts created by the act of the parties, it has already been shown that there is not a clause or word in the first section that makes it applicable to the former and not to the latter. It may be admitted to be doubtful whether before the Statute of 29 Car. 2, c. 3, a trust

either created or transferred by parol, would have been specifically executed in Equity, when the purchase money or a substantial part of it had not been paid, or possession given; for the reported cases are in conflict. 1 Sugd. on Vend. 203, 10th ed. But this has no bearing upon the Chief Justice's distinction. If a trust transferred is within the Act, so is a trust created by the act of the parties; and if the latter is not within the Act, neither is the former. The Act has no force as to either if it does not comprehend trusts, but is applicable to legal estates only. All equitable estates in land are trusts, and all trusts of land are equitable estates. If the Act of 1772 is confined to legal estates, it does not comprehend any trust whatever; and if it comprehends any trust whatever, it comprehends all equitable estates created or assigned by the act of the parties, for the words embrace every description of estate of the kind to which the Act refers, be it legal, or be it equitable as well as legal. And it is this very case of the assignment of an equitable estate by parol, which, as soon as *Murphy* v. *Hubert* shall be received as a definitive interpretation of the Act, will expose in the greatest degree the danger of this interpretation; for we cannot believe that there is strength in the foundation on which the distinction between transfers and creations rests, to bear the assault of serious argument.

4. The Chief Justice supposes that the transcriber of the adopted sections of the English Statute, knew all that he has remarked upon the effect of them, including the distinction between the creation and the transfer of trusts,—that he was a lawyer of no little skill, —and that he omitted the 7th and other sections of the Statute to *prevent* their provisions from becoming the law of the land.

It is respectfully doubted, not that he was a lawyer of skill, for we have no ground for either doubt or belief upon the point, since we do not know who he was, and his office in the consolidation was that of making a literal transcript of the first three clauses of the first enactment of the English Statute, omitting the qualification in regard to the excepted case of leases not exceeding three years from the making, the principle if not the form of which qualification it would have been wiser to retain, and also omitting copyhold or customary interest, which never had any existence in Pennsylvania. This almost literal transcript of three sections, and the quite literal transcript of four other sections, was the whole service of this unknown person.

But it is doubted whether the transcriber or the Assembly, knew the meaning and effect of the adopted sections, as the Chief Justice states them. With some experience in point of time, we must say that most of the Chief Justice's suggestions on this subject, are new, and as to the distinction between the creation and transfer of trusts, and the defence of it in the clause "either at law or in equity," no want of research has prevented us

from finding any previous authority in support of it. It is obvious from two or three previous cases in our own reports, that the Chief Justice's conservative disposition, has led him to favour the distinction, with a view to confine the evil of parol trusts within as narrow a field as possible, even to *gratuitous* trusts declared by the grantor with the assent of the grantee, or *vice versa;* but except his own authority, which is admitted, the distinction seems to have no support; and no weight therefore is to be gained for it, by supposing that the writer of the Bill for the Committee, or the House, had the same views, for this is begging the very question. The omission of the 10th and 11th sections of the Statute is most persuasive evidence, that in the apprehension of the Assembly, an estate in lands, tenements and hereditaments, had, in our courts of mixed jurisdiction, been immemorially understood to mean an equitable estate as much as a legal estate, and therefore that the words in the first section of the Act had breadth enough to cover trusts, without the aid of the 7th, 8th and 9th of the Statute.

5. But what the Chief Justice obviously holds to be the main support of his doctrine in *Murphy* v. *Hubert*, is the following, and it is admitted to be worthy of particular consideration.

Resulting trusts he thinks are excepted from the 29 Car. 2, c. 3, *only* by force of the 8th section, which, being omitted in the Act of 1772, leads to this consequence, that if the first section of the Act is applicable to trusts, so that the creation of trusts by parol is forbidden by the Act, there is "no exception at all to it, because we would look in vain for a sentence upon the subject. No clause in it could be tortured into a provision for implied estates, but the concluding one, which declares that no leases, estates, &c., shall at any time be assigned, granted, or surrendered, unless by deed or note in writing, signed by the party so assigning, granting, or surrendering the same, or their agents thereto lawfully authorized by writing, *or by act and operation of law*. But the last words relate not to the creation of trusts, but to leases, which may be surrendered by act and operation of law."

That this is not a correct statement of the effect of the Act upon trusts arising or resulting by construction or implication of law, will be shown presently; but supposing that originally it might have been, is it admissible at this time of day, when for half a century the Judges of the Supreme Court have repeatedly given the most solemn judgments that implied or constructive trusts are an exception out of the Act of 1772, as much as they are out of the English statute? Most frequently it has been so held, where the opinion of the Court has obviously been that the Act was applicable to equitable estates, as much as to legal. In one case it was so held, thirty-seven years since, upon the express hypothesis that it did extend to both kinds of estates. The law has been perfectly settled that *resulting* trusts by operation of law, trusts *arising* by operation of

law, trusts by construction of equity, by payment of purchase money, by *mala fides*, by breach of fiduciary duty or relation, are all the same in this State, whatever be the interpretation of the Act, as they are in England under the Statute. The Chancery authorities in England upon these heads, have been cited, applied, adopted in these judgments, as completely apposite to cases in Pennsylvania, as so many exceptions out of the Act of 1772. The judgment in *Pugh* v. *Good*, 3 Watts & S. 56, delivered by the Chief Justice himself, is an authority for this position. It seems therefore to be very dangerous at this time of day to argue, that if the Act is applicable to trust estates, "there is no exception at all to it;" and as a consequence of the argument, to hold, as the Chief Justice must hold, that these judgments are entitled to respect, not upon the ground and for the reasons assigned by the Court for rendering them, but only upon a ground and for reasons which the Court did not assign, and which are inconsistent with those the Court did assign.

The importance of this matter as a fact, will justify a repetition of the reference to some of the cases referred to.

Gregory's Lessee v. *Setter*, 1 Dall. 193, a case of parol trust, was ruled as an exception out of the Act, upon the authority of *Harvey* v. *Harvey*, 2 Chan. Ca. 180, an anonymous case in 2 Ventr. 361, cited in Gilb. For. Rom. 232, 233, *Willis* v. *Willis*, 2 Atk. 71, and *Lloyd* v. *Spillet*, 2 Atk. 150, all of which were ruled as exceptions out of the Statute of Frauds.

The *Lessee of Thompson* v. *White*, 1 Dall. 424, was a trust sustained by parol, both as a resulting trust and a trust *mala fide;* and in a solemn opinion of *McKean*, C. J., that learned judge couples the Statute of Frauds and the Act of 1772, as having the same effect, and as being open to the same exceptions.

In the Lessee of *German* v. *Gabbald*, 3 Binn. 305, *Tilghman*, C. J., with whom both the other judges concurred, said: "If our Act does not comprehend the case of trusts, there is an end of the question, because there will be nothing to prevent parol proof of anything by which a trust may be inferred. But, *supposing it to be as comprehensive as the English Statute*, still parol evidence may be given to establish a trust which arises by implication of law." The Chief Justice certainly knew that the 8th section of the Statute was not in the Act, and nevertheless he says, that under the Act, even if it comprehends trusts, an implied trust may be sustained by parol.

In *Wallace* v. *Duffield*, 2 Ser. & R. 526, the same learned Chief Justice, in support of the parol trust which was established by the judgment of the Court as a resulting trust, said, "*resulting* trusts are not within the provisions of the Act of Assembly which requires conveyances of land to be in writing." He obviously implies that trusts generally are within the Act; and it would be quite hypercritical to say that it was not a *resulting* trust at all, but only a trust that *arose* to the owners of the purchase money, for whose use

it was invested in the land. A resulting trust, strictly speaking, is perhaps only such a trust as falls back to the grantor upon his parting with the legal estate; but the expression is used generally, and by both lawyers and judges, to signify a trust inferred from premises,—the payment of purchase money, the practice of fraud, and the like. The Chief Justice meant that all such cases were out of the Act. They are exceptions from the general operation of the Act.

Brown v. *Dysinger*, 1 Raw., 413, was a case of purchase by A at sheriff's sale, who declared at the time that he was bidding for B, who was resident on the land; and the Court held that the parol evidence was sufficient to sustain the trust, as an exception out of the Act. "The object of the Act was to prevent fraud; and to allow it to be interposed as a bar to the performance of this parol engagement, would encourage the very mischief which the Legislature intended to prevent." Cases of *mala fides* are therefore held to be exceptions out of the Act. *Hoge* v. *Hoge*, 1 Watts, 163, and several other cases of parol trust by devise, have been established upon the same ground.

Graham v. *Donaldson*, 5 Watts, 452, was a case of the same species as *Brown* v. *Dysinger*, but on the laches of the *cestui que trust* to call for the conveyance, the Court overruled the claim. It is referred to for the language of Sergeant J., who delivered the Court's opinion. "It is not a case to be favoured by a Court of Equity, because *parol trusts* are contrary to the *letter* and spirit of the Act against Frauds and Perjuries, and are calculated to let in all the litigation, uncertainty, and mischief which that Act intended to prevent, when it required that interests in land, *whether legal or equitable*, should be manifested by writing. It is true, the Court has gone so far as to hold, that when one purchased at sheriff's sale in trust for another, and thereby prevented others from bidding, it was a trust arising *ex maleficio*, and was one of the cases *excepted out of the Act.*"

The same doctrine from the same judge appears in *Fox* v. *Heffner*, 1 Watts & S. 375.

In *Robertson* v. *Robertson*, 9 Watts, 36, and *Haines* v. *O'Conner*, 10 Watts, 320, Judge Rogers delivered judgment with the same recognition of exceptions out of the Act; but his language in *Jackman* v. *Ringland*, 4 Watts & S., 150, is peculiarly apposite. "That parol evidence may be received to establish a trust has been repeatedly ruled; but the question is what is a trust which comes within this principle? *It is confined*, as I take it, to those cases of resulting trusts, which arise from an implication of law, as for example, where the money is paid by one, the property purchased and the title taken in the name of another."

The last case to be referred to in this connexion is *Sample* v. *Coulson*, 9 Watts & Ser. 66, where Sergeant J. seems to conclude the matter by these remarks. "But a trust cannot be established

by the proof of parol declarations made by a purchaser at the time of his purchase or afterwards. This would be in direct violation of the provisions of the Act of Assembly to prevent frauds and perjuries, which requires interests in lands to be created or transferred by writing. It is true, *there are exceptions* admitted on Equity principles, of a resulting trust arising from the payment of money by the *cestui que trust* for the purchaser, or of a parol contract of sale, and possession taken, and money paid by the vendee, or cases of fraud or mistake in the preparation and drafting of instruments; but a mere parol declaration by a purchaser who has taken the deed in his own name, and paid his own money, cannot be admitted to establish a trust in favour of third persons, without subverting the provisions, and frustrating the design of the Statute."

These references incontestably show, that from the earliest day that we have any reports of judicial decisions in Pennsylvania since the Act of 1772, our Courts have held with perfect uniformity, that there are excepted cases of trusts which may be proved by parol, notwithstanding the Act may comprehend equitable as well as legal estates. They show more than this; but they show this by a train of authorities that entirely overthrows the suggestion, that if the first section is applicable to trusts, "there is no exception to it at all." We submit with great confidence, that at this time of day it cannot be judicially held, that "if the first section of the Act is applicable to trusts, there is no exception to it at all," without overturning the whole structure of the law in this particular from its foundation. If anything is settled in Pennsylvania, this is settled, that there are exceptions which admit the proof of *resulting* and other trusts by parol, even if the Act does comprehend trusts as well as legal estates.

It is further submitted however—1. That no *express* exception in the Act is necessary to justify the admission of parol evidence to sustain a trust, upon the ground of fraud, or public policy to prevent fraud. 2. That the 8th section of 29 Car. 2, c. 3, if literally incorporated into the Act of 1772, would not have justified parol evidence, further than the admission of such evidence is justified by authority without it.

1. An express exception is made unnecessary by the well-settled principle, that the Act being made to prevent fraud, it shall not be so interpreted or applied as to support fraud. All cases of fraud are therefore excepted out of the Act. There is no exception of cases of fraud in the English Statute, any more than in the Act, and none has ever been held necessary to justify courts of Equity in establishing trusts by parol evidence, where there was *mala fides*. And this comprehends a vast proportion of all the parol trusts that have been established in Pennsylvania. It might be applied to comprehend them all; for there are very few if any trusts by construction of equity, that might not be enforced upon the ground of fraud, or of public policy to prevent fraud, which last ground is of most

comprehensive influence in affecting parties with the character of trustees, without regard to the character of the evidence whether parol or written. And it is perfectly clear that all the cases of renewals of leases by trustees in their own name, and of purchases of trust property by trustees either at public or private sale, or by any agent or person having a fiduciary relation, and all cases of trick, deceit or imposition in obtaining the legal title, are wholly independent of the express exception in the Statute of Frauds, and as such have been uniformly established as trusts in this State. See 1 Cruise, 472. *Webb* v. *Dietrich*, 7 Watts and S. 402.

All the cases of part performance of parol contracts of sale, which have been established in this State, have gone on precisely the same principle as in England. They are exceptions out of the Statute in England, for which the express exception in the 8th section makes no provision. We may censure, if we see fit, as individuals, the prodigal interference of Courts of Equity with the letter of the Statute; but no court in Pennsylvania can judicially disregard what has been so done, because our courts have gone even further than they have gone in England in this course, and it is established law under the Act as much as it is in England under the Statute. Indeed the principle, that exceptions to the Statute exist in Equity, though not provided for in the body of the Act, has never been censured by any one, nor can it be, but only the too extensive application of it to circumstances;—and the question at present is, as to there being any exception at all.

An express exception was not necessary therefore to justify any of the cases in Pennsylvania, in which either fraud, or public policy to prevent fraud, was a ground for taking the case out of the Act of 1772; and this includes them all, even such as have been ruled upon the ground that the purchase money was paid by one, and the conveyance taken in the name of another; for there is a bounty upon fraud and an encouragement of it, in the application of the Act to any such case, even when there is no actual fraud, which can rarely happen.

The express exception of trusts which arise or result from a conveyance by the implication or construction of law, and this is the language of the 8th section of the Statute, is, when taken by fair construction, of very partial influence.

Trusts by operation of law do not require the aid of the 8th section of the Statute, if they are the result of a conveyance or other writing, *signed by the party*, for in that case the 7th section does not destroy them. The 7th section requires no more than that the trust shall be manifested and proved by writing signed by the party; and therefore when the trust either express or implied is so manifested or proved, the 7th section does not apply; and if it is not so manifested and proved, and the trust does not arise or result from a conveyance, then the exception does not save it, and the trust, if sustained by other proof, can be sustained upon general principles of equity only. This will be shown under the next head.

2. It is necessary to advert to the words of both the 7th and 8th sections of the Statute, the 8th being in terms a proviso to the 7th.

The enacting clause in the 7th section of the Statute is in these words: "All declarations or creations of trusts or confidences of any lands, tenements or hereditaments, shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of no effect."

The proviso in the eighth section is in these words: "That where any *conveyance* shall be made of any lands, *by which* a trust or confidence shall or may arise or result by the implication or construction of law, or be transferred or extinguished by an act or operation of law, then, and in every such case, such trust or confidence shall be of the like force and effect as the same would have been if this Statute had not been made, anything herein contained to the contrary notwithstanding."

The proviso is a qualification of the enacting clause. The exception in the eighth section has been introduced to prevent an effect which the seventh section would either necessarily produce, or might be apprehended as likely to produce, unless it was restrained or qualified.

The words of the seventh section are universal; they make *all* trusts, unless manifested and proved by writing signed, or by last will in writing, *utterly void* and of no effect.

It would have been a reasonable interpretation certainly, to hold that the seventh section had no reference to trusts resulting by operation of law, but only to trusts declared or created by the act of the parties. So also it might have been reasonably held that no part of the Statute extends to conveyances of record, fines and common recoveries, as conveyances of the legal estate, and therefore that the seventh section did not embrace uses resulting from such conveyances. This may still be the better interpretation. But the words of the section are very plain and strong. There is no distinction in it between different kinds of trusts, between trusts resulting and trusts direct, or between trusts declared, which might be thought to imply an express act, and trusts created, which might be an implication of law from an act. *All declarations or creations of trusts or confidences* are made utterly void and of no effect, unless manifested or proved by writing signed.

And by the words *trusts or confidences* are included *uses* also, notwithstanding what is said in *Lamplugh* v. *Lamplugh*, 1 P. Wms. 112, and Lord Holt's first impression as stated in *Bushell* v. *Burland*, Holt's Rep. 736; for all the other judges were against him in *Anglesea* v. *Altham*, Gilb. Rep. Eq. 17, and he appears to have acquiesced.—Gilb. on Uses, 111, note 1.

Against this strong language it was probably deemed best by Lord Chancellor Nottingham, who was the father of the Statute,*

* See 3 Campbell's Lives of the Chancellors, 418, *Ash* v. *Abdy*, 3 Swanst. 664; but although both Sir Leoline Jenkins and Sir Matthew Hale probably assisted in the pre-

to provide by the eighth section the safeguard for trusts and uses arising or resulting from conveyances by operation of law; and if Lord Holt's construction of the seventh section would have prevailed in the absence of the proviso, it is well that it was enacted; for in the case of *Anglesea* v. *Altham* he says that "the first clause is general, that *all uses* must be manifested by writing; and if it had stopped here, a fine or feoffment had cut off all *resulting uses*, though there had been no consideration;" Gilb. Eq. Rep. 16: that is to say, resulting uses, as much as other uses, being required by the Statute to be manifested and proved by writing signed by the party, fines, common recoveries and feoffments, notwithstanding the principle of the common law by which, in the absence of consideration and use expressed, the use results to the conusor, feoffor, &c., would have carried the estate with the use to the conusee, &c., and the use would not have resulted: it would have carried the estate to the conusee, feoffee, &c., not by way of use, to which the seventh section was as fatal as to the resulting use, but by the common law. See also as to lease and release, Gilb. on Uses, 232, note 2 by Sugden.

Mr. Sugden, in his edition of Gilbert on Uses, 117, note 2, adopts what Lord Holt said in *Anglesea* v. *Altham*, that unless that exception had been introduced, "there could have been no resulting use upon a fine, feoffment, or common recovery." But although this is very intelligible as to a feoffment without charter, for such a conveyance with livery of seisin, has by the first section of the Statute only the force or effect of a lease or estate at will, it is not so easy to understand it in regard to conveyances of record, by fine or common recovery, which the first section has not displaced, though it does not expressly except them; and if the Statute did not destroy them, as it certainly did not, it is not so clear why it should destroy the use that results from them in certain cases. It is not so easy to understand why the seventh section should extend to conveyances of record, to which the first did not extend, nor why it should extend to trusts by operation of law, instead of being confined to trusts by agreement of parties.

Such, however, was Lord Holt's construction of the seventh section of the Statute of Frauds, and of the proviso to it, in the case of *Anglesea* v. *Altham;* and this seems to be the whole effect of both sections upon uses and trusts *resulting* from conveyances, not manifested and proved by writing signed by the parties,—that the seventh section destroys them absolutely, along with all other trusts of every description, and that the eighth section saves such of them as arise or result by construction of law *from a conveyance*, and none other.

puration of the Statute, it has always been thought more entitled to praise for the wisdom of its *general design*, which comprehends trusts as much as legal estates, than for the accuracy and propriety of all its enactments.—See *Wyndham* v. *Chetwynd*, 1 Burr. 418; *Wain* v. *Warlters*, 5 East. 17; *Clerke* v. *Hoil*, 3 Mod. 219; *Eggleston* v. *Spike*, 3 Mod. 258.

If the trust results from a conveyance by writing signed, or from a writing signed which manifests and proves the trust, the seventh section does not destroy it, and therefore the eighth section is not necessary to save it.

The trust which the exception saves and was intended to save, is therefore such a trust as arises by a conveyance which is not signed, and where there is no writing signed which manifests or proves the trust, but the trust is matter of construction or implication by law from the face of the conveyance.

Upon all conveyances, whether by transmutation of possession as by feoffment, fine, or common recovery, or where the use is raised by force of the consideration, the use or trust results, or does not result, by construction of law, accordingly as there is or is not a consideration paid by the feoffee, or grantee, or a third person, and a use is or is not expressed. It is unnecessary to cite the books and cases.*

If there is nothing in the conveyance from which the trust by construction or implication of law can result or arise, nor any writing signed that manifests and proves the trust, then it follows, that if the trust can be sustained at all, it can be sustained only by other evidence, and therefore is not within the eighth section of the Statute; for to suppose that the eighth section of the Statute is a saving of all trusts arising by conveyances by the aid of parol evidence, is to forget the whole ground of the assault upon Chancery for breaking down the Statute by permitting parol evidence to sustain trusts which were not proved by writing. Trusts which do not arise by operation of law from a conveyance itself, or from writing signed, are trusts by construction of equity; and where equity receives parol proof of purchase money paid, or of any other fact in addition to the conveyance, it does it upon the ground that in equity there is a resulting trust from the consideration, and that

* As to resulting *uses* the general principle is, that as the mere alteration of possession does not in equity give a right, it shall be to the use of the donor, unless 1st, the use is expressed, or 2d, there is a valuable consideration. *Gilb. on Uses* by Sugden, 89, 110, 118, note 3, 119–123, 422. But a use cannot result against the intention of the parties, as where an estate is limited to the settlor, different from that which would have resulted. Gilb. on Uses, 120, note 3 by Sugden. *Adams* v. *Savage*, 2 Ld. Ray., 855.

As to resulting trusts by a conveyance by construction of law, the principle is generally the same. In one case there is a difference—that a trust does not result from the mere want of valuable consideration alone. 1 Sand. on Uses, 334.

As to resulting trusts by *construction of equity*, see 1 Sand. on Uses, 319–338, and the four classes into which the author divides them, 1. Trusts by notice, 2. Trusts by payment of purchase money, 3. Trusts of the residue, where the express declaration extends to a part only of the land, or estate, or interest in it, 4. Trusts by relation of parties. Mr. Sanders omits a specific head of trusts, *mala fide*, which is a general head of equity in regard to trusts of every kind; but under the third head he mentions "fraud, mistake, and the like" as grounds for converting a grantee into a trustee, 1 Sand. 335; and as to trusts of the residue, it may very well be, that the residue may result by operation of law from the face of the conveyance, as it did in *Huston's lessee* v. *Hamilton*, 2 Binn. 378, and not merely by construction of equity.

it is against conscience to set up the Statute against the parol evidence.

To illustrate this position: If a deed of bargain and sale recites, as in all the Pennsylvania cases has been recited, that the purchase money was paid by the nominal purchaser, and there is nothing in the conveyance nor in any other writing to manifest the fact from which the trust results or arises, then, if the trust is sustained at all, it must be upon other evidence, and the case by fair construction is not within the exception, nor would the exception have helped it, if it had been literally introduced into the Act.

In all cases then of trusts in England, where there is writing signed which manifests and proves the trust, the exception is unnecessary, and where there is no writing signed that manifests and proves the trust, the exception saves the trust only when it results by construction of law from the face of the conveyance. If it results from the parol proof of the fact, and yet is sustained in Equity against the import of the conveyance, or without anything in the conveyance to raise the trust by construction of law, this is not within the exception in the 8th section, and if sustained at all, is sustained by construction of Equity.

And it is on this section of the Statute that strict constructionists have assailed the Courts of Equity for receiving parol evidence to establish a trust, by the payment of the purchase money, when there is no recital or equivalent expressions in the deed to show that the complainant had paid it.

Mr. Sanders says that "in order to raise a trust of this kind, the fact of the ownership of the money should appear on the face of the deed, either by a recital, or by expressions which should amount to a necessary implication, or presumptive proof of it. If, however, it is expressly stated in the deed that the money was paid by the nominal purchaser, and nothing shall appear to explain the transaction, then, if such nominal purchaser shall in his lifetime, by a note or memorandum in writing, or by his answer to a Bill filed against him for a recovery thereof, (though he shall at the same time plead the Statute of Frauds,) confess the purpose for which the purchase was made,—OR, if after his death he shall leave any papers disclosing the real circumstances of the case,—in all these instances, the court will raise the trust even against the express declaration of the purchase deed." But if he denies the facts by his answer, and insists upon the Statute of Frauds, "it should seem," he says, "that parol proof cannot be admitted to prove the trust." "And it is conceived," he adds, "that after the death of the supposed nominal purchaser, parol proof alone can in no instance be admitted against the express declaration of the deed. 1 Sanders on Uses and Trusts, 322."

Mr. Sugden remains to the 10th and last edition of his Treatise on the Law of Vendors and Purchasers, a strenuous opposer of this distinction between the lifetime and the death of the nominal pur-

chaser, and is of opinion that the Statute is not more broken in upon by admitting parol proof after the death of the nominal purchaser, than it is by allowing such proof in his lifetime. 3 Sugd. V. and P. 258. And this opinion he says seems to be confirmed by Sir William Grant in *Lench* v. *Lench*, 10 Ves. Jr. 511.

But it is manifest that both these writers agree that the trust is not raised by the conveyance by construction of law, unless the payment by the third person is recited or appears in the deed or some other writing, but by the equity of the payer of the purchase money to have the estate. When Mr. Sugden says that the clear result of all the cases, without a single exception, is that the trust of the legal estate, whether freehold, copyhold, or leasehold, whether taken in the name of the purchaser and others, or in the names of others without that of the purchaser, results to the man who paid the purchase money, unless such a resulting trust would break in upon the policy of an Act of Parliament, and that a custom that the nominee shall take beneficially cannot stand against the right in *Equity* of the purchaser to the resulting trust, he places all this doctrine upon grounds of Equity, and not upon the words of the exception in the Statute of Frauds. 3 Sugd. V. and P., 255.

Mr. Roberts, it is true, says that "by the *express* words of the Statute of Frauds, all resulting trusts, and trusts arising by operation of law, are *left upon their original footing*. Such constructive trusts, therefore, whenever they spring *out of facts*, or of the equitable relation of parties to each other, may by virtue of the said exception, be set up by parol evidence." Roberts on Statute of Frauds, 94.

But the first clause of this paragraph is a misrecital of the Statute, and inconsistent with what he afterwards states, though it tallies pretty well with the law as held by Lord Hardwicke. The clause which follows, imports a less questionable meaning: "But where the relative obligations and rights of the parties are stipulated by written instruments, the instruments must still speak for themselves by *expression or implication*, and no extrinsic collateral evidence ought to be received to ingraft other additional trusts upon the deed by proof of intention, *unless upon a ground of fraud* or circumvention." Ib.

Roberts accordingly, notwithstanding what he says of trusts which spring out of facts, is one of those who agree with Mr. Sanders, and is cited by him as so agreeing in opposition to Mr. Sugden, in rejecting parol evidence, when the deed recites that the purchase money was paid by the nominal purchaser, except under the qualifications contained in the passage extracted from Sanders's work. See Rob. on Stat. Frauds, 99.

But Mr. Sugden correctly cites Sir William Grant, as sustaining *him* in *Lench* v. *Lench*, on the authority of Lord Hardwicke. In that case Sir W. Grant cited the declaration of Sir Thomas Clarke in *Lane* v. *Dighton*, Ambl. 409, that "if it was *res integra*, he

should have thought that the parol evidence ought not to have been admitted;" yet he conceived himself bound upon the determination of Lord Hardwicke to receive such evidence, and said he must not be wiser than his predecessors. It was Lord Hardwicke, who in *Ryal* v. *Ryal*, 1 Atk. 59, and also in the case of *Lane* v. *Dighton* in 1762, ten years before our Act of Frauds, sanctioned the admission of parol evidence to raise a resulting trust, there being nothing in the deed itself, contrary to the fair construction of the 8th section of the Statute, and disregarding the cases nearest the time of the Statute, of the *Earl of Plymouth* v. *Hickman*, 1 Vern. 148, *Kirk* v. *Webb*, Prec. in Chan. 84, *Newton* v. *Preston*, Prec. in Chan. 103, *Halcot* v. *Marchant*, cited Ambl. 410, and *Heron* v. *Heron*, Prec. in Chan. 163, which affirmed that the trust must be collected from the face of the conveyance.

To the authority of Lord Hardwicke the Courts of Pennsylvania have resorted, and not to the language of the exception; and to this principle, that resulting trusts are not within the Statute or any part of it, they must have come, even if the exception had been introduced into the Act of 1772. That section according to its fair construction does not admit of parol evidence to raise a trust from the payment of the purchase money, when the deed recites that it was paid by the grantee, for in that case the trust does not arise or result from or by the conveyance, but from the fact proved by parol; and this evidence may be as well admitted in this State without the 8th section, as with it. And so the law is settled here if anything is settled.

It is often said that the Statute of Frauds does not apply to resulting trusts at all, that is to say, that the 8th section does no more than would have been done without it, by interpretation of the 7th; and this is apparently true under the Equity doctrine just stated, for that doctrine does strike the exception out of the Statute, and interpolates a wholly different one.

This was Judge Story's opinion in *Hoxie* v. *Carr*, 1 Sumner, 187, in regard to the Act of Frauds in Rhode Island, which contains no exception of resulting trusts.

He regards the exception as only "affirmative of the general law;" and Chancellor Kent appears to concur, and closes the reference to that case, with a remark that is undoubtedly well founded, and makes the true interpretation of the Statute in this respect of secondary importance: "And most certainly resulting trusts must arise in many cases in Equity, from the manifest justice and necessity of the thing, without any statutory exception, and especially in cases of conveyances procured by fraud." 4 Kent's Com. 305, note c. 4th ed.

The opinion of these learned jurists is of particular weight in regard to a Statute of Frauds like the Act of 1772, which does not contain the 7th section of the Statute, 29 Car. 2, c. 3, destroying *all* trusts, nor consequently the saving exception of resulting trusts in the 8th, and therefore is a perfectly fair case for the application

of the doctrine which is approved by both of them, particularly as the Act excepts from the operation of the first section, assignments and grants, as well as surrenders, by *act and operation of law.*

There is no necessity to assume the task of justifying all the inroads of Courts of Equity upon the provisions of this salutary Statute. It is difficult to defend some of them, and it is more difficult to defend some of our own, than any in England. But there are several cases, in which if Equity had not received parol evidence, even against the face of the deed, the Statute would have been to almost as great a degree a protection of fraud, as it is a prevention of it; and whether the admission of parol evidence to prove the ownership of the purchase money, or to prove any facts which raise a trust in conscience, was originally wrong or right, is now perfectly immaterial, because the law is settled, if anything is settled, that such cases do not violate the Statute, and equally well settled that they do not violate the Act of 1772, supposing it to extend however clearly to equitable estates as much as it does to legal.

It is not quite accurate to say as Mr. Fonblanque does, that the proviso in the 8th section *extends* to trusts by construction of Equity. The more accurate expression would be, that the Statute has no reference to trusts by construction of Equity generally, any more than it has to particular trusts in Equity, trusts *mala fide*, trusts by notice, trusts by fiduciary relation, and therefore does not prohibit the averment and proof of them by any evidence, parol or circumstantial, which does not contravene the policy of the Statute. The great controversy has been whether in all instances Courts of Equity have sufficiently regarded the policy of the Statute. In some, nay, in many, and in all where there is the least tincture of fraud, they have admitted parol evidence to prove the trust, with universal approbation, and without a suggestion that it violated the Statute, which makes no exception of fraud.

To apply these remarks to the Act of 1772, supposing it to include trusts as much as legal estates:—

If the Act of 1772 includes equitable estates, it makes the *making or creation* of them, unless put in writing and signed by the parties so making or creating the same, or their agents, &c., of the force and effect of leases or estates at will only, except leases for the term of three years from the making; and it declares that they shall not be assigned, granted or surrendered, unless by deed or note in writing signed by the parties, or their agents, &c., or by act and operation of law.

If trusts resulting by operation of law are not within the Act at all, according to Judge Story's opinion, the Act does not apply to them, and the use or trust results by a fine, common recovery, or feoffment by deed, or by any other conveyance, as if the Act had not been made, without the necessity of any express exception.

If resulting trusts are within the Act, as well as other trusts, and

the use or trust results from a conveyance by writing signed, or by any other writing which creates, assigns, grants or surrenders it, it is within the enactment of the first section, and no express exception is necessary.

And if there is nothing on the face of the conveyance to show the resulting trust, and the trust depends upon the parol proof of a fact which raises the trust by construction, the trust if sustained at all, must be sustained by Equity upon grounds which make the 8th section of no effect in the case. If the exception in the Statute had been expressly repeated in the Act, it would have been without effect in such a case.

6. After the consideration given in the preceding pages to the principle on which implied trusts are supported in Pennsylvania, it must be unnecessary to comment upon the final remark of the Chief Justice, that "perhaps no decision has declared in words, that an express parol declaration of trust is valid in Pennsylvania; *but all the decisions* in support of *implied* trusts have gone on a principle *which extends equally to them.*"

If we had been called upon to enunciate a proposition upon this head, we confess that we should have put it in directly opposite terms; namely, that the decisions in Pennsylvania in support of implied trusts, have in every instance but one, gone upon a principle which did not extend to express parol trusts, and in that instance, the *Lessee of German* v. *Gabbald*, the exclusion of express parol trusts from the Act, was purposely pretermitted as a question that it was not necessary to decide. The principle on which implied trusts have been supported, has been, that they are excluded or impliedly excepted from the Act by fraud, or public policy to prevent fraud, or bad faith if not fraud in refusing to execute a parol agreement partly performed, or claiming the estate without paying the purchase money. The principle on which an express parol trust must be supported, is that under the Act parol proof is as good as writing signed, because the Act does not extend to trusts of any kind, express or implied. This principle is therefore wholly irrespective of fraud, public policy to prevent fraud, conscience, or any other ground of exception from the words of the Act.

The conclusions which the preceding remarks are thought by the writer to warrant, are the following:

1. That the Act of 1772 does extend to trusts as much as to legal estates.

2. That it extends equally to creations and to transfers of trust; and if not to the one, it does not to the other.

3. That it does not extend to trusts resulting or arising by operation of law, but only to trusts and estates made, created, &c., by the act of the parties.

4. That trusts by construction of equity, trusts *mala fide*, trusts

by notice, trusts by relation of parties, trusts resulting from the fundamental equity declared in *Pelly* v. *Madden*, 21 Vin. 498, pl. 15—that "trust results to the party from whom the consideration moves," are under the Act of 1772, as they are under the Statute, 29 Car. 2, c. 3.

Finally, it is deserving of consideration, if trusts generally are not within the Act, whether this is not fatal to all the decisions in our courts, which have refused to decree specific performance of a parol sale of land. Such agreements do not raise an available trust in England, because the Statute declares them to be utterly void to this effect, and Courts of Equity require part performance to implicate the party's conscience, before they will decree the trust, and enforce a conveyance. But if a parol agreement is valid to raise a trust, then the seller is a trustee by construction of equity, without more. If the agreement be in *writing signed*, Courts of Equity specifically enforce the execution of it without regard to any previous part performance, for the contract for the purchase raises a trust immediately to the purchaser, and the vendor is a trustee till conveyance. 1 Cha. Ca. 39; 9 Mod. 78; 7 Vez. 425; 1 Cruise, 311. If a trust may be created by parol, as beyond doubt it may be if trusts are not within the Act of 1772, why not in like manner enforce it without part performance? There can be no answer, except upon the state of the authorities before the Statute of Frauds, some of which show that such agreements were specifically executed, and such as do not, imply that the agreements were valid to all intents but that of obtaining the aid of Chancery. The cases in which our courts have refused to enforce parol agreements of sale, without part performance, imply that a trust cannot be raised by parol agreement under the Act of 1772. Every case of the kind decided in this state, has followed the Chancery decisions in England, as if in this respect there was not the least difference between the Statute and the Act; and until *Murphy* v. *Hubert*, this has been regarded as the law in Pennsylvania.

Whether the Supreme Court will reconsider its opinion in that case, it is not for the writer to determine. He is not at all confident of any such result. But it cannot be doubted by the Chief Justice himself, for he acknowledges the danger to which the public are exposed by allowing trusts of any kind to be proved by parol, that if the opinion is not reconsidered, the public safety requires a new enactment by the Legislature.